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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 497

STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND ILLINOIS COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action No. 51 C 1316

STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND ILLINOIS CENTRAL RAILROAD COMPANY,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Plaintiffs-Appellants submit this statement discussing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of Illinois, Eastern Division, has not been reported as of this date. A copy of the memorandum, findings of fact, conclusions of law, and order are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on October 31, 1951. A petition for appeal is presented to the District Court for the Northern District of Illinois, Eastern Division, herewith on this date, namely, November 16th, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 United States Code, §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *North Carolina* v. *United States*, 325 U. S. 507; *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341.

Questions Presented

A. Did the Interstate Commerce Commission have authority under § 13(4) of the Interstate Commerce Act to issue an order prescribing intrastate commutation and multiple fares for the suburban system of the Illinois Central Railroad Company, located wholly within the State of Illinois, where such fares were heretofore maintained exclusively under the authority of the State of Illinois and where, with respect to the same fare proposals dealt with by the Interstate Commerce Commission in its order, there was pending before the courts of the State of Illinois an appeal taken by the Illinois Central Railroad Company to review an order by the Illinois Commerce Commission denying the proposed increases?

B. Did the commutation and multiple fares which were in effect on the suburban system of the Illinois Central Railroad Company prior to the order of the District Court below cause discrimination against interstate commerce within the meaning of § 13(4) of the Interstate Commerce Act?

C. Did the court below properly discharge its obligation in reviewing an order issued by the Interstate Commerce

Commission under the provisions of § 13(4) of the Interstate Commerce Act where, as findings of fact, it set forth merely the statements as to what the report of the Interstate Commerce Commission contained without any reference whatsoever to evidence in the record cited to the court which fairly detracts from the weight of the evidence in the record which might support the order?[1]

Statutes Involved

Sections 13(3) and 13(4) of the Interstate Commerce Act, as amended, (49 U. S. C. §§ 13(3) and 13(4)) are set forth in Appendix B hereto.

Statement

Appellants, Plaintiffs below, are the State of Illinois and the Illinois Commerce Commission. That Commission is an administrative agency of the State of Illinois, created under an Act entitled "An Act concerning public utilities," approved June 29, 1921, and now in force as amended (Chap. 111 2/3, Ill. Rev. Stats. 1949). As such agency it is charged with the duty, among other things, of fixing and regulating the intrastate fares charged by railroads, including the Illinois Central Railroad Company (Railroad), for the transportation of persons within the State of Illinois.

Railroad is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the City of Chicago, County of Cook, State of Illinois. Railroad is engaged, as a common carrier by railroad, in the business of providing line-haul steam and diesel powered passenger and freight transportation service both in intrastate and interstate commerce, and of

[1] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above sets forth the major issues.

operating a separate electrified suburban passenger transportation system, wholly intrastate, in the southern portion of the City of Chicago and in certain suburbs south of Chicago, and is a public utility within the meaning of Section 10 of the Illinois Public Utilities Act. Railroad's separate electric suburban system is situated entirely within the County of Cook in the State of Illinois and provides local transportation service between the center of the City of Chicago and its south and south eastern areas and certain suburban towns located south of the city limits. In 1949 more than 31,000,000 of the passengers, or approximately 83 per cent of the total passengers, were entirely local to Chicago. Approximately 24¼ road miles of track, of a total of 38.29 operated in suburban service, or 63 per cent, are located inside the corporate limits of the City of Chicago. Railroad's suburban passenger system is operated primarily as an integral part of the local transportation system of the City of Chicago, and in competition with other forms of local transportation within the city. Commutation and multiple fares on Railroad's suburban system have been continuously subject to the exclusive jurisdiction of the Illinois Commerce Commission, and have been established and maintained exclusively under the authority of the State of Illinois.

On March 3, 1950, however, Railroad filed with the Interstate Commerce Commission a petition proposing increased commutation and multiple fares on its suburban system and praying that the Interstate Commerce Commission find that the present intrastate round-trip, commutation and multiple rates, fares and charges of Railroad's suburban system constitute a burden on interstate commerce in violation of Sections 3, 13 and 15a of the Interstate Commerce Act, and that the Commission require the removal of the alleged violations through approval of the

rates, fares and charges proposed by it. These proposed fares were calculated to increase revenues by about $2,000,000. The Interstate Commerce Commission assigned Docket No. 30560 to said proceeding and designated it "Illinois Central Multiple Fares in Chicago Area."

On March 30, 1950, Railroad filed with the Illinois Commerce Commission its Tariff No. 525, to become effective May 1, 1950. The fares proposed therein were the same as those proposed in Railroad's petition in Interstate Commerce Commission Docket No. 30560. In accordance with the provisions of the Illinois Public Utilities Act, the Illinois Commerce Commission, on April 12, 1950, suspended the proposed tariff and set the matter for hearing.

The Attorney General of the State of Illinois, on April 17, 1950, on behalf of the Illinois Commerce Commission, filed with the Interstate Commerce Commission a motion for the dismissal of Railroad's petition of March 3, 1950, on the ground that the fares involved were then the subject of investigation by the Illinois Commerce Commission, and that the Interstate Commerce Commission was without jurisdiction. By order entered April 20, 1950, in Docket No. 30560 the Interstate Commerce Commission deferred action on the Illinois Commission's motion to dismiss pending hearing, and set the petition for hearing on May 8, 1950, at Chicago, Illinois.

In the evidence it presented before both commissions, Railroad sought to justify its fare proposals on the basis of an alleged operating deficit of $335,000 resulting from its suburban operations in 1949. The record shows, however, that some $510,000 of allegedly joint system-wide administrative and supervisory expenses which were apportioned to the suburban system in fact conferred no benefits on the suburban system and were developed in a manner directly violating the basic requirements and provisions of the

accounting rules prescribed by the Interstate Commerce Commission for the separation of such joint expenses. The record also shows that expenditures for 1949 on Railroad's suburban system included abnormal expenses in excess of $500,000 which were in no way attributable to operations in 1949. These abnormal expenses represented heavy cyclical repairs for the renewal and replacement of property for the purpose of restoring service capacity consumed in prior years. These abnormal expenses were substantially non-recurring.

On February 28, 1951, after extensive hearings, the Illinois Commerce Commission entered an order in its Docket No. 38302 in which it found the fares proposed in Tariff No. 525 not just and reasonable. The tariff was permanently suspended, cancelled and annulled. Railroad's petition for rehearing was denied by order of the Illinois Commerce Commission on April 3, 1951. On April 5, 1951, Railroad filed with the Illinois Commerce Commission its Notice of Appeal from the order of February 28, 1951, in accordance with the provisions of Section 68 of the Illinois Public Utilities Act. The certified record before the Illinois Commerce Commission has been filed with the Circuit Court of Cook County, Illinois, and briefs have been submitted to the court by all parties.

On July 30, 1951, while Railroad's appeal was pending in the Illinois courts, a report and order were simultaneously entered by the Interstate Commerce Commission in which Railroad was authorized and required to charge the commutation and multiple fares prescribed in an appendix thereto. These fares were calculated to increase passenger revenues by some $1,300,000. The report purported to find such fares to be just and reasonable and necessary to remove an alleged discrimination against interstate commerce. In upholding Railroad's original contentions with

respect to its operating deficit, the Commission gave no effect to its finding that a net credit of $248,000 should be made to the suburban system for the non-revenue transportation provided Railroad's non-suburban employees. As a further basis for its finding of discrimination against interstate commerce resulting from Railroad's suburban commutation and multiple fares, the Interstate Commerce Commission found that such fares were not contributing the highest possible earnings, although the Interstate Commerce Commission also found that in 1949 Railroad's operating deficit of $13,000,000 on its entire passenger operations was much greater, absolutely and relatively, than the purported deficit on Railroad's suburban system. The Interstate Commerce Commission also found Railroad's total operations in 1949 resulted in a net railway operating income of $25,000,000. In prescribing commutation and multiple fares purported to be necessary to remove the alleged discrimination against interstate commerce resulting from the fares then in effect on Railroad's suburban system, the Interstate Commerce Commission held that only suburban fares and revenues producing a suburban rate of return identical to Railroad's system-wide return could remove such discrimination as was purported to exist. The order was approved by seven of the eleven Commissioners of the Interstate Commerce Commission. Chairman Walter M. W. Splawn and Commissioners Clyde B. Aitchison and Hugh W. Cross joined in a dissent to the report written by Commissioner J. Haden Allredge. Service of the report and order of July 30, 1951, was made on August 8, 1951.

On August 17, 1951, Appellants brought an action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission for the reason that the order exceeded the

lawful authority and jurisdiction of that Commission. The three-judge District Court assigned to hear the matter entered an order on October 31, 1951, denying the application for a permanent injunction and dismissing the complaint. Appellants take this direct appeal for the purpose of having reviewed this order of the District Court.

The Questions Are Substantial

1

The first question presented above raises for the first time before this Court an issue under §§ 13(3) and 13(4) of the Interstate Commerce Act profoundly affecting what this Court has termed the "primary authority of the states to regulate intrastate rates." *North Carolina* v. *United States*, 325 U.S. 507, 511. In its order of July 30, 1951, the Interstate Commerce Commission, over the dissent of its chairman and three members, adopted the position that even with respect to intrastate commutation and multiple fares hitherto maintained exclusively under state authority, the Interstate Commerce Commission could order an increase in such intrastate fares at a time when the carrier whose fares were involved was seeking before the state courts increases in excess of those prescribed by the Interstate Commerce Commission. As a result of the untimely action by the Interstate Commerce Commission, the State of Illinois, in order to seek a review of this order, was required under §§ 1336 and 2321 of Title 28 U.S.C. (C. 646, June 25, 1948, 62 Stat. 931, 969) to bring an action before the federal courts at a time when the matter of Railroad's same fare proposals was before the courts of the State of Illinois.

This Court in the *North Carolina* case held that the provisions of § 13(4) of the Interstate Commerce Act did not deprive the states of their primary authority to regu-

late intrastate rates. It is utterly inconsistent, however, with the exercise of such primary authority by the states, to permit carriers to circumvent all state regulation by means of petitions filed with the Interstate Commerce Commission invoking the authority of that body to prescribe increased intrastate fares on the allegation that rates authorized by a state at some previous time presently discriminate against interstate commerce. Under the procedures adopted by the Interstate Commerce Commission in the interpretation of its own powers, the primary authority of the states to regulate intrastate rates is reduced to an empty phrase devoid of meaning. Such procedures vest in the carriers the absolute power to determine whether new intrastate fare proposals are in any case to be submitted to state authority. This is not a situation which was intended to result from the adoption of § 13(4) of the Interstate Commerce Act. It is inconceivable that a carefully limited grant of power to the federal authority to prescribe intrastate rates under certain narrowly defined circumstances should be magnified into a grant of plenary jurisdiction, by the practice of permitting carriers to completely circumvent the primary state authority as they see fit.

It was suggested below by Defendants-Appellees that this issue has already been resolved by *Florida* v. *United States*, 282 U.S. 194. In that case, however, the federal authority was invoked by the State of Georgia by its complaint that certain intrastate rates maintained within the State of Florida were unreasonably preferential, unduly prejudicial, and unjustly discriminatory. In short, the federal authority was invoked for the single purpose of resolving an economic dispute between two states. The resolution of this type of dispute constitutes one of the principal functions of the paramount federal authority. This appeal,

however, presents an entirely different problem. This proceeding did not originate as a dispute between two states. It arose under the separate and distinct provisions of § 13 (3) authorizing carriers to file petitions with the Interstate Commerce Commission for the purpose of instituting investigations. If for any reason Railroad considered it necessary or advisable to seek an increase in its suburban fares, it was afforded an adequate remedy under the provisions of Illinois law. It is significant that the fare proposals submitted by Railroad to the Interstate Commerce Commission as necessary to remove discrimination against interstate commerce resulting from its then existing suburban fares, were the same as those eventually submitted to the Illinois Commerce Commission as "just and reasonable" under Illinois law. (Illinois Public Utilities Act, Section 32; Chap. 111⅔, Ill. Rev. Stats. 1951, § 32). The issue on this appeal is, therefore, whether the Interstate Commerce Commission may prescribe Railroad's intrastate suburban fares at a time when the "just and reasonable" nature of the same fare proposals under Illinois law is an issue pending before the courts of the State of Illinois as the result of Railroad's own appeal.

2

The fact that all of Railroad's suburban commutation and multiple fares are intrastate and that its suburban system functions as an integral part of Chicago's local transportation system also makes the case unique. The single jurisdictional finding made by the Interstate Commerce Commission in its order of July 30, 1951, was that the commutation and multiple fares then in effect on Railroad's suburban system caused a revenue-wise discrimination against interstate commerce. This ultimate finding was based on the subsidiary finding by the Interstate Commerce Commission which accepted the $335,000 oper-

ating deficit resulting from suburban operations as originally alleged by Railroad. As shown above, this finding was based on the arbitrary failure of the Commission to give effect to its own findings, it own accounting rules, and generally accepted rate-making principles. Even assuming the existence of this deficit, however, the ultimate jurisdictional finding of discrimination was an error as a matter of law. Every previous case before this Court on appeal from similar orders has involved intrastate traffic constituting an indistinguishable and integral part of an interstate operation extending beyond the borders of a particular state. These cases fall into one of two categories. One category involves orders prescribing increased intrastate fares on a statewide level where intrastate fares were maintained by state authority at a lower level than interstate fares applying to the same traffic, e.g., *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U.S. 563; *United States* v. *Louisiana*, 290 U.S. 70, 71, 72, 79. The other category relates to non-statewide orders where on a single integrated transportation system, involving both the intrastate and interstate carriage of a particular commodity or the rendering of a particular service, the intrastate fares were lower than the interstate fares applying to the same operations, as in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 483, 485. As the cases cited above indicate, both types of orders find theoretical justification in the identity of operating circumstances applicable to both interstate and intrastate traffic.

With respect to discrimination against interstate commerce, this Court has held that § 13(4) of the Interstate Commerce Act requires that "intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system." *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U.S.

563, 586. In subsequent cases the same principle has been stated as a requirement that intrastate traffic "produce its fair share of the earnings" or that intrastate traffic yield its "just proportion of the carrier's earnings." *United States* v. *Louisiana*, 290 U.S. 70, 75; *Pennsylvania R. R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 459.

It is significant, therefore, that in the cases cited above and in all similar cases before this Court the Interstate Commerce Commission had never made reference to a proper numerical return to be earned from intrastate traffic. Such a determination was unnecessary because where it was assumed that proper earnings from *the particular type of traffic* was being produced by the interstate fares, the lower scale for intrastate fares *applying to the same traffic on the same system* presumably resulted in intrastate earnings which were too low. The principle invariably applied, therefore, was that the fair share of the carrier's revenues to be earned by intrastate traffic is properly determined on the basis of the earnings from the same type of interstate traffic.

In this case, however, the Interstate Commerce Commission for the first time considered as a separate issue the proper numerical earnings resulting from intrastate fares. This was necessary because Railroad's suburban commutation system is separate and distinct from all other operations, and its traffic is wholly intrastate. There was, therefore, no basis for equating interstate and intrastate earnings by comparing intrastate fares and interstate fares applying *to the same class of traffic on the same transportation system.*

Under these circumstances the Interstate Commerce Commission arbitrarily found that where Railroad's intrastate suburban and commutation fares were earning less than the highest return that the effective demand for Railroad's services would permit, such fares caused discrimi-

nation against interstate commerce. The creation and adoption of this new theory was necessary to enable the Interstate Commerce Commission to regulate Railroad's intrastate suburban fares. In finding discrimination on this basis only the Interstate Commerce Commission gave no effect to its finding that the deficit purported to result from Railroad's suburban operations in 1949 was relatively much lower than Railroad's system-wide passenger deficit. If effect had been given to its policies with respect to the proper return generally ascribable to suburban operations and to the basis for prescribing commutation rates, it would have been necessary to find no discrimination resulting from the fares then in effect. Suburban commutation operations have been held to a lower level of remuneration than that produced by basic passenger coach fares. See: *Commutation Fares to and From Washington, D. C.*, 33 I.C.C. 428, 434; *Commutation Fares Between New York City and New Jersey Points*, 264 I.C.C. 583, 592. The justification for this lower degree of remuneration for suburban traffic results in part from the significant contribution consequently made by suburban operations to profitable freight operations. See: *Increased Passenger Fares, Eastern Railroads*, 269 I.C.C. 87, 89; *Commutation Fares Between New Orleans and The Gulf Coast*, 270 I.C.C. 281, 285-6.

This Court has stated that action by the Interstate Commerce Commission in prescribing intrastate fares should be directed to "substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce * * *." *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 590. Appellants contend that where the remuneration from Railroad's intrastate suburban service is shown to be higher than the standards prescribed by the Interstate Commerce

Commission for similar interstate services, there is neither a real discrimination nor an obstruction to interstate commerce. The Interstate Commerce Commission, however, either ignores the doctrine completely or contends that a real discrimination and obstruction to interstate commerce is caused by fares for a particular class of intrastate traffic which are lower than the maximum fares that the effective demand for the carrier's services will permit. No clarifying interpretation of this judicially imposed limitation on federal authority has been made by this Court since the initial decision in 1922. Such an interpretation is now essential for the purpose of defining the scope of federal authority over the regulation of intrastate fares.

3

In *North Carolina* v. *United States*, 325 U. S. 507, 510, 511, this Court set forth the standard of judicial review in cases of this nature as follows:

> "The crucial question involved in all these contentions is whether the indispensable prerequisites to the exercise of the Federal Commission's power over intrastate rates have been shown to exist with sufficient certainty."
>
> * * *
>
> "Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' "

The existence of these judicially prescribed standards makes it even more essential that the findings of the Interstate Commerce Commission be something more than arbitrary conclusions unsupported by substantial evidence in the whole record. The primary authority of the states to regulate intrastate fares can be even more effectively abolished through an uncritical application of the doctrine of administrative finality than it can be through the failure

of the Interstate Commerce Commission to make the essential jurisdictional findings which are indispensable prerequisites to the exercise of its authority.

Appellants, on the basis of evidence in the record cited to the court below, established the fact that the Interstate Commerce Commission, in finding Railroad's suburban system was operated at a deficit in 1949, accepted accounting techniques in Railroad's cost-finding study which patently violated the accounting rules and regulations prescribed by the Interstate Commerce Commission. Appellants similarly established the fact that the Interstate Commerce Commission, in finding such deficit, failed to give any effect to other findings contained in its order with respect to the necessity of certain credit adjustments to the revenue data originally presented by Railroad. It was further shown that if effect were given to the accounting regulations and to certain findings of the Interstate Commerce Commission, it would have been necessary to find that Railroad's suburban operations in 1949 resulted in a substantial net railway operating income rather than the deficit purported to exist.

The recent decision of this Court in *Universal Corporation* v. *National Labor Relations Board*, 340 U. S. 474, requires that any evidence in the record which fairly detracts from the evidence allegedly in support of an administrative order should be considered by a reviewing court in determining whether an order has substantial support in the evidence. The District Court, however, in its findings of fact fails to make any reference to Appellants' contentions. The findings of fact do not even state that such contentions were found to be without merit. On the contrary, without any basis in the findings of fact, the District Court reached a "conclusion of law" that the findings of the Interstate Commerce Commission were supported by the evidence. If the doctrine of administrative finality is held as a matter of law to vest every finding by the Interstate Commerce Com-

mission with substantial support in the evidence, the primary authority of the states to regulate intrastate fares must inevitably give way to the uncontrolled exercise of power by the federal administrative agency. This is not only contrary to the intent of Congress, but it violates the standards of review prescribed by this Court in the exercise of its "scrupulous regard for maintaining the power of the state in this field." *North Carolina* v. *United States*, 325 U. S. 507, 511. The issue before the Court on this appeal is whether the principles enunciated by this Court in the *North Carolina* case are to be vitiated through a failure by the federal courts on judicial review to give adequate consideration to conclusive evidence of arbitrariness in the exercise of the federal administrative authority. Somewhere in the system of judicial review it must be contemplated that such evidence be given the consideration it merits when properly brought to the attention of the courts.

Conclusion

For the reasons stated above, it is submitted that the questions presented by this appeal are of public importance and fully justify review by this Court of the judgment of the District Court in this cause.

Respectfully submitted,

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APPENDIX A

In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action No 51 C 1316

State of Illinois and the Illinois Commerce Commission, *Plaintiffs*,

vs.

United States of America and Illinois Central Railroad Company, *Defendants*,

and

Interstate Commerce Commission, *Intervening Defendant*

Before Finnegan, Circuit Judge, Campbell, District Judge, and Perry, District Judge:

Memorandum—Findings of Fact, Conclusions of Law and Order

Perry, *District Judge:*

This action was brought by the State of Illinois and the Illinois Commerce Commission pursuant to 28 U.S.C. 1336, 1398, 2284, 2321, 2322, 2323, 2324 and 2325. The City of Chicago, Chicago Heights, Blue Island, Harvey, the villages of Flossmoor, Park Forest, Matteson, Homewood, Hazel Crest and Riverdale, and the Illinois Central Commuters' Committee intervened on behalf of the complainants and joined with them in their prayer for relief. The United States of America, the Interstate Commerce Commission and the Illinois Central Railroad, a corporation, are defendants.

The complainants and intervening petitioners all seek by this action to enjoin the Interstate Commerce Commission from carrying out its order granting increased suburban rates to the Illinois Central Railroad after full and extended hearings, findings and conclusions. The Interstate Com-

merce Commission's action was taken upon the petition of the Illinois Central Railroad, a carrier, pursuant to authority of 49 U. S. C. 13, which provides as follows:

> Sec. 13(3): "Whenever * * * in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the (regulatory) authorities of any State * * * with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered * * * to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. * * *"
>
> Sec. 13(4): "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any

State or the decision or order of any State authority to the contrary notwithstanding."

There are only two questions presented in this proceeding: (1) Did the Interstate Commerce Commission have the authority or power to enter an order on July 30, 1951, fixing suburban rates on the Illinois Central Railroad in Chicago and the vicinity thereof after a petition, notice and hearing pursuant to 49 U. S. C. 13? (2) Did the Interstate Commerce Commission hold a full hearing and receive such substantial evidence as would support its findings, conclusions and order?

1. If the Interstate Commerce Commission had no such authority or power under the aforesaid section of the United States statute to hold such hearings, make such findings of fact and conclusions of law and enter such order for multiple and commutation fares as it did on July 30, 1951, then the prayer of the complainants for an injunction restraining the Interstate Commerce Commission and Illinois Central Railroad from putting the order into effect should be granted.

On the other hand, if the Interstate Commerce Commission is held to have such authority or power, then the prayer for such injunction should not be granted until it is determined whether the Interstate Commerce Commission held a full hearing upon the petition of a proper party, gave lawful notice, made findings and conclusions and entered an order based upon substantial evidence such as would support its findings, conclusions and order.

The record reveals that the petitioner is a carrier and that all legal notices were given. If it shall be determined that the Interstate Commerce Commission has authority or power to hold such hearing, make the findings and conclusions and enter the order that it did on July 30, 1951, the only remaining question is, did it hold a full hearing and base its findings, conclusions and order upon such substantial evidence as would support its final order?

Much has been said about the fact that multiple and commutation fares are largely if not wholly intrastate commerce and that the action of the Interstate Commerce Commission was invading the sovereign authority of the

State of Illinois in holding hearings, making findings and conclusions and entering an order for multiple of commutation fares different and, in general, on a considerably increased basis as compared to the same fares in force pursuant to the action of the Illinois Commerce Commission, an intrastate body. The position of the complainants on that score is untenable, and has been so since the United States Supreme Court rendered its decision in the Shreveport case cited as *Texas and Pacific Railway Co.* v. *U. S., etc.*, 234 U. S. 342. That was six years before the passage of subsections 3 and 4 of section 13 of Title 49 U.S.C., commonly known as the National Transportation Act. It is generally conceded that the principles of the Shreveport case were codified by the National Transportation Act.

In that case, where the Interstate Commerce Commission found that intrastate rates established by the Texas commission were unduly and unjustly discriminatory to interstate commerce travelling over the same area, the court held that Congress through the Interstate Commerce Commission had the power to examine and to make determinations in order to resolve the conflict between the state and national authorities on such questions. The court cited the historical principle that, in order to avoid the problems which overwhelmed the Confederation, to relieve interstate trade from the impediments resulting from rival local governments and to provide a basis for national unity and an insurance against conflicting and discriminating state legislation, Congress was given a comprehensive grant of power over interstate commerce. The court emphasized the fact that this power reaches not only interstate commerce itself, but also such related matters as might affect the security, the efficiency and the maintenance of interstate commerce. In this Shreveport case the court, at page 351, said:

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means

of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

It is the view of this court that the facts of the instant case bring it clearly within the purview of the above principle enunciated by the Supreme Court, even if the National Transportation Act had never been passed. It is unnecessary for the court to do more than note that this principle was approved by two later cases before the passage of the National Transportation Act: *American Express Co.* v. *Caldwell*, 244 U. S. 617; and *Illinois Central Railroad Company* v. *Public Utilities Commission of Illinois, et al.*, 245 U. S. 493.

The leading United States Supreme Court case on the controversy between intrastate and interstate commerce that was heard after the passage of the National Transportation Act was the case of Railroad Commission v. Chicago, Burlington & Quincy Railroad, 257 U. S. 563. In that case the court had before it the question as to whether or not the Interstate Commerce Commission had the power or authority to examine the relationship between intrastate rates and interstate rates under the provisions of 49 U.S.C. 13, subsections 3 and 4; and, further, the question as to whether or not the Interstate Commerce Commission had the power or authority to make determinations with respect to these intrastate rates after it had found that they constituted unlawful discrimination against interstate commerce. In upholding the proposition that the Interstate Commerce Commission did have such power and authority, Justice Taft, at page 588, said:

"It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate

specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

In the argument before this Court the case of Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341, was urged as a recent case showing a different viewpoint on the problem of federal authority over intrastate activities. That case was not brought under the Transportation Act. No hearing occurred before the Intrastate Commerce Commission under 49 U.S.C. 13. The suit was one in which the plaintiff sought to go into a federal district court and enjoin the action of the Public Service Commission of the State of Alabama, which had entered an order refusing to permit the Southern Railway to discontinue certain trains. The court in a special footnote specifically stated:

"As the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. section 13 (4) has not been invoked for decision as to whether the continuance of this intrastate service constitutes an undue discrimination against interstate commerce, we cannot, in this proceeding, consider any impact the order of the Ala-

bama Public Service Commission might have on interstate commerce."

It is therefore clear that the court did not intend its decision in that case to alter or change in any way the principles that have been consistently followed in the interpretation of the National Transportation Act.

The plaintiffs and intervening petitioners have maintained that this court is without jurisdiction for the reason that the Illinois Commerce Commission reached a different conclusion upon the same facts and that there is now pending an appeal from its decision in the Circuit Court of Cook County.

It is sufficient for this court to point out that the result of that proceeding can in no way affect the jurisdiction of this court or the power and authority of the Interstate Commerce Commission. The Circuit Court of Cook County may sustain the Illinois Commerce Commission, but that makes no difference. The power and authority of the Illinois Commerce Commission and jurisdiction of the Circuit Court of Cook County are limited to interpreting and applying the statutes of the State of Illinois, creating and giving power to the Illinois Commerce Commission. It may very well be that, under the Illinois law, the Illinois Commerce Commission's report and findings are proper. Even if the Circuit Court of Cook County had already sustained the report of the Commission and the matter had been finally concluded the Interstate Commerce Commission would still have the power and authority under 49 U.S.C. Sec. 13 (4) to hear the petition in the instant case, and this court would have jurisdiction to determine whether or not the findings, conclusions and order of the Interstate Commerce Commission were founded upon and warranted by substantial evidence.

It is entirely possible that the Circuit Court of Cook County could reverse the Illinois Commerce Commission; and, the Illinois Commerce Commission might conceivably order higher rates than those ordered by the Interstate Commerce Commission. The Circuit Court of Cook County and the Supreme Court of Illinois might sustain the state administrative body in such action; in that case the railroad

might obtain higher rates than those granted by the Interstate Commerce Commission herein. That would be legal and proper under our dual system of government unless and until a further action could be instituted under the provisions of 49 U.S.C. Sec. 13 (4), wherein a proper showing might be made that the new and higher rates interfered in a prejudicial manner with interstate commerce.

This court would not have the jurisdiction to determine the rates under the Illinois law or to set aside or alter the findings, conclusions or orders either of the Illinois Commerce Commission or of the Circuit Court of Cook County, if the petitioner relied upon diversity of citizenship or the due process clause of the Federal constitution as was done in the case of *Alabama Public Service Commission, et al.* v. *Southern Railway Co.*, 341 U.S. 341. There is no question of comity involved in the case at bar for the reason that the Interstate Commerce Commission has the power and authority to enter the order herein under 49 U.S.C. Sec. 13 (4) regardless of whether it is the state law or merely the administration of the state law that interferes with interstate commerce in a prejudicial manner.

Without reciting or repeating the findings of fact, the court emphasizes the fact that it has been found that the railroad's multiple and commutation fares are not producing their fair share of the earnings required to enable the railroad to meet its maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate, and hence are discriminatory revenuewise against its interstate traffic. The provisions of 49 U.S.C. Sec. 13 (4) are especially designed to counteract just this type of situation; they prescribe the method whereby such unjurt discrimination against interstate commerce shall be relieved, and that is the method used in the instant case.

This court concludes that the Interstate Commerce Commission had the power and authority under the provisions of 49 U.S.C. Sec. 13 (4) to entertain the petition, hold the hearings, make the findings and conclusions and enter the order which it did.

This court has carefully examined the voluminous transcript of testimony taken and the numerous exhibits ex-

amined and considered as evidence by the Interstate Commerce Commission, ever mindful of the decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. From such examination the court is convinced that the order of the Interstate Commerce Commission meets a high standard of certainty and is founded upon substantial evidence, and that the order as well as the findings and conclusions of the commission were warranted by the evidence. This court finds that the Interstate Commerce Commission was clearly justified in making the findings and conclusions and entering the order that it did. This court makes no attempt to weigh the evidence in this case, for to do so would be to substitute its judgment as to matters of fact for that of the Interstate Commerce Commission, which the Supreme Court has repeatedly held we cannot do.

Accordingly, this court finds the issues for the defendants and files herewith its findings of fact and conclusions of law.

The prayers for injunction sought herein are denied, and the complaint and intervening petitions are dismissed for want of equity.

Findings of Fact

1. This is an action by the State of Illinois and the Illinois Commerce Commission against the United States of America and the Illinois Central Railroad Company to suspend, enjoin, set aside and annul the order of the Interstate Commerce Commission dated July 30, 1951, in its Docket No. 30560, entitled *Illinois Central Multiple Fares in Chicago Area*, the report of which appears in 281 I.C.C. 537.

2. The order directs the Illinois Central Railroad Company, hereinafter sometimes called ICRR or petitioning carrier or petitioner, (1) to cease and desist from practicing the undue, unreasonable, and unjust discrimination found to exist by finding No. 4 of the report, namely, that the multiple and commutation fares of the Illinois Central Railroad Company for intrastate travel between stations on its suburban lines within the State of Illinois, made or imposed by authority of that State, cause and, unless in-

creased to the extent set forth in said report, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of the provisions of paragraph (4) of section 13 of the Interstate Commerce Act; and (2) to establish and maintain for intrastate travel between points in Illinois on its suburban lines multiple and commutation fares on the bases referred to in finding No. 5 of said report, namely, that such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel the multiple and commutation fares on the bases set forth as "prescribed" in the Appendix to said report.

3. The order prescribes 10-trip, 25-trip, and 50-trip (twin-25) multiple fares and weekly and restricted and unrestricted monthly commutation fares, as shown in the Appendix to the report, for application for intrastate travel between points in Illinois on the suburban lines of the Illinois Central Railroad Company. The Commission found, among other things, that said prescribed fares will yield a return after taxes of about 3.2 per cent, and an average increase of about 20 per cent, or $1,300,000 per annum, which the Commission found to be the approximate measure of the revenue discrimination against interstate commerce resulting from the present multiple and commutation fares of the Illinois Central Railroad Company.

4. The proceeding in which this order was issued was initiated by a petition, such as expressly authorized by section 13(3) of the Interstate Commerce Act, filed with the Interstate Commerce Commission on March 3, 1950, by the Illinois Central Railroad Company, a common carrier by railroad engaged in the transportation in interstate commerce of freight and passengers in Illinois and various other states, with lines of railway extending from Chicago, Ill., to New Orleans, La., from Chicago to Council Bluffs, Iowa, and to many other points in various states. It is also engaged in intrastate commerce in Illinois, including the transportation of passengers over its suburban lines extending from Chicago to Richton, Ill., 29 miles, with branches from 67th Street to South Chicago, 4.9 miles, and from 115th Street (Kensington) to Blue Island, Ill., 4.3 miles. In its said petition it alleged that its then prevailing round-

trip, commutation, and multiple-ride rates, fares and charges applicable to intrastate transportation of passengers within the Chicago suburban area were then resulting and would continue to result in (a) undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce in Illinois, on the one hand, and interstate commerce, on the other, and (b) undue, unreasonable and unjust discrimination against and a burden upon interstate commerce, in violation of section 13 (3) and (4) and sections 3 and 15a of the Interstate Commerce Act. Said petition prayed that the Interstate Commerce Commission institute an investigation under section 13(3), and, by appropriate order under section 13(4), require the removal of the alleged violations of the Interstate Commerce Act by authorizing and requiring (a) the establishment, in lieu of its then existing commutation and multiple-ride tickets and the fares applicable thereto, 10-ride, 25-ride, and 50-ride (twin-25) tickets at increased fares, and (b) the elimination of its then existing round-trip tickets and fares therefor (then on the basis of 180 per cent of its one-way fares).

5. The petition was assigned for hearing and on due notice was heard before an examiner of the Interstate Commerce Commission beginning on May 11, 1950, and continuing for 25 days thereafter in July, August, September, October and November, 1950. At said hearing the Illinois Central Railroad Company, petitioner, by its counsel; the Illinois Commerce Commission, by the Attorney General of Illinois, the Assistant Attorney General of Illinois and a Special Assistant Attorney General of the State of Illinois; the City of Chicago, by its Special Assistant Corporation Counsel; the Villages of Flossmoor, Hazel Crest, Park Forest and Homewood, Ill.; the City of Harvey, Ill., and the Illinois Central Commuters' Committee, through their attorney, and others, appeared and participated in the proceeding.

6. A large volume of testimony, covering several thousand pages, and numerous documentary exhibits were introduced by the parties at said hearing. All of the evidence therein introduced has been presented to this Court.

7. After the completion of the hearings briefs were submitted by the parties and an examiner's proposed report was issued and served, in which the examiner found that the suburban fares in question were unduly low and caused undue prejudice against persons and localities in interstate commerce and unjust revenue discrimination against interstate commerce, and recommended that said prejudice and discrimination should be removed by certain increases in the intrastate fares in question but not in all instances to the level proposed by the petitioning carrier.

8. Exceptions to the examiner's proposed report were filed by the Illinois Commerce Commission, the City of Chicago, the Village of Flossmoor, et al., and the petitioning carrier. On May 28, 1951, oral argument was presented to the Interstate Commerce Commission at Washington, D. C.

9. On July 30, 1951, the Commission issued its report, *supra*, containing its findings of fact, conclusions and decisions in the premises, and with it the order involved in this suit.

10. In its report the Commission made findings of fact, based upon the evidence, describing the suburban service in question and explaining in detail the various types of fares applicable thereto, the amounts thereof, and the types of tickets and fares proposed by the petitioning carrier. The Commission also considered the mass of evidence bearing on the question of the cost to the petitioning carrier of performing the suburban service, and in the report found and concluded "that the cost (operating expenses and taxes) incurred by petitioner in 1949, ascribable to its suburban service, as reasonably as may be approximated, exceeded its revenues for that year by about $335,000." This latter figure does not include an amount of $207,756 shown by the evidence to be interest on funded debt attributable to the suburban properties directly pledged as security for funded debt.

11. The report also considers evidence submitted by the protestants intended to show that certain maintenance-of-way and equipment expenditures in 1949, as shown in petitioner's evidence, were abnormal, and the report made findings and rulings upon this subject, including the finding

that "In any event, suburban maintenance expenditures at the 1949 level or higher are now necessary and will be necessary for the forseeable future, in order to provide adequate service for petitioner's current passengers."

12. The report also makes findings and conclusions upon a mass of evidence intended to show the net credit that should be accorded the suburban service for the transportation of non-suburban employees, and the report contains the finding that $248,271 may, under all the circumstances, be accepted as substantially accurate for the purposes of the proceeding.

13. The report considers and makes findings upon a mass of evidence relating to the valuation of the property devoted to the suburban service, and finds, after giving due consideration to all the evidence as to elements of value, that, for the purposes of these proceedings, the value of petitioner's property devoted to the suburban service is about $35,000,000.

14. The report finds that in 1949 petitioner earned on its entire system a net railway operating income of about $25,000,000, yielding a return of 3.23 per cent on its estimated rate-making value, and 4.4 per cent on its recorded investment less depreciation.

15. The report also makes the following finding: "Even giving full consideration to protestants' criticisms as to general expenses, normal maintenance, and nonrevenue passengers, the return from this suburban service is far lower than that from petitioner's system operations and, under the fares approved herein, will still be somewhat lower than the return from its nonsuburban operations."

16. The report finds that the petitioning railroad's present multiple fares are far below those recently prescribed for the Chicago & North Western Railway Company between Chicago and points in Illinois and Wisconsin in *Commutation Fares Between Chicago and Wisconsin*, 279 I.C.C. 773, decided December 15, 1950. The report further finds that the present multiple fares of the petitioning railroad are in many instances so low that the corresponding through fares of the Chicago, South Shore & South Bend Railroad Company are higher than the combination of the fares of the latter railroad from stations on its line, such as Ham-

mond, Gary, Michigan City and South Bend, Ind., to 115th Street, plus the ICRR's fare beyond. To illustrate this fact the report gives a single example, viz., from Gary, Ind., the 10-trip fare of the Chicago, S.S. & S.B. R.R. Co. to Randolph Street is $8, and its 10-trip fare to 115th Street is $5.15, while the ICRR's 10-trip fare between 115th Street and Randolph Street is $2.58, resulting in a combination of $7.73.

17. The report finds that the present ICRR commutation fares are lower than the fares prescribed by the Interstate Commerce Commission in any recent proceeding, among which are *Commutation Fares Between Chicago and Wisconsin*, 279 I.C.C. 773, referred to above, *New York Central Commutation Fares, Chicago and Indiana*, 279 I.C.C. 188, decided October 24, 1950, and *Chicago, S.S. & S.B. R. Fares*, 279 I.C.C. 663, decided December 4, 1950, prescribing commutation fares in the Chicago area, and *Commutation Fares, Eastern Railroads*, 278 I.C.C. 491, decided June 29, 1950, prescribing interstate commutation fares to and from eastern cities, and *New York State Commutation Fares, New Haven Railroad*, 279 I.C.C. 151, decided October 9, 1950, prescribing, under section 13(4) of the Interstate Commerce Act, intrastate fares for application over the New York, New Haven & Hartford Railroad between New York City and points in New York equal in amount to similar interstate fares for comparable distances previously prescribed for application between New York City and points in Connecticut in *Increased Passenger Fares, Eastern Railroad*, 269 I.C.C. 87 (1947). The report further finds that despite the low level of said present commutation fares of the ICRR in the Chicago area, there is practically no travel thereunder for the shorter hauls due to the still lower level of the present multiple fares of said carrier.

18. The report finds that while there was a steady increase in the number of passengers carried on the petitioner's suburban lines for 20 years following 1926, the number has since declined, 47,067,959 passengers having been carried in 1946 and 37,893,715 in 1949. This decline in recent years is ascribable to the growing trend toward the five-day week and to the increase in the use of private automobiles.

19. The report finds that the quality of petitioner's suburban service is somewhat superior to that afforded by the street car and elevated lines and busses operating in the Chicago area and that the record is convincing that petitioner's traffic will bear some increases but not to the full extent proposed by petitioner.

20. The report finds that in 1949 petitioner incurred a deficit from its entire passenger train service of about $13,000,00, or much greater, absolutely and relatively, than the deficit incurred from its suburban operations.

21. The report finds that petitioner's basic passenger fare, 2.5 cents per mile in coaches, is the same as the Interstate Commerce Commission has approved for other railroads in the South and West (in *Increased Coach Fares on Western Railroads*, 269 I.C.C. 632, decided in February 1948), and is generally much higher than the ICRR's suburban fares at present in effect, or those proposed by that carrier in this proceeding or those approved and prescribed in the order here involved.

22. The report finds that petitioner's multiple and commutation fares are not producing their fair share of the earnings required to enable petitioner to meet its maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate, and hence are discriminatory, revenuewise, against its interstate traffic as a whole. The report reaches the conclusion that under the circumstances it is not only within the power of the Interstate Commerce Commission, but it is its duty, to require that the discrimination be removed, citing *Wisconsin R.R. Comm.* v. *Chicago, B. & Q. R.R. Co.*, 257 U.S. 563; *Florida* v. *United States*, 282 U.S. 194, 212, 214; *Florida* v. *United States*, 292 U.S. 1, 5; *North Carolina* v. *United States*, 325 U.S. 507, 514-515.

23. The report finds that in *Commutation Fares Between Chicago and Wisconsin*, 279 I.C.C. 773, and related State proceedings, the Interstate Commerce Commission prescribed for the Chicago & North Western Railway Company 10- and 25-trip multiple fares made 5 and 11½ times the corresponding round-trip fares, and that the Interstate Commerce Commission and the Illinois Commerce

Commission approved unrestricted monthly commutation fares ranging from $3.85 for 3 miles, to $7.20 for 6 miles, and $19.20 for 29 miles.

24. In the report the Commission found and concluded, giving due consideration to petitioner's revenue needs, the nature, cost, and value of its suburban service, and the history and comparison of fares, that the unjust discrimination found in said report to exist can and should be removed by the establishment and maintenance of 10-, 25-, and 50-trip multiple fares on the bases proposed by petitioner, as shown in Table I of the Appendix to the report, subject, respectively, to maxima of 5, 11½, and 23 times the corresponding round-trip fares, and of unrestricted monthly commutation fares ranging from $6 for distances of 6 miles and under to $17 for 29 miles, with weekly and restricted monthly fares made the customary 25 and 90 per cent thereof, all as set forth in the said Appendix.

25. The report finds that the fares thus prescribed will average somewhat lower than those of the Chicago & North Western Railway Company and considerably lower than those prescribed for the eastern railroads, including the Chicago, South Shore & South Bend Railroad Company and the New York Central Railroad Company in the Chicago area.

26. The report finds that the fares prescribed therein will be lower than the basic (coach) fare [of 2.5 cents per mile] applying over petitioner's lines generally, will result in substantially increased revenue, and are necessary to enable petitioner to earn an adequate return over and above the cost of carrying the travelers thereunder so that it may maintain its well-being and be in a position to attract capital, in other words, so that its suburban operations may be self-supporting and have a long-term survival value; otherwise the burden of supporting the suburban operations must rest largely on petitioner's interstate freight traffic.

27. The report finds that the fares approved therein will yield a return after taxes of about 3.2 per cent, and an average increase of about 20 per cent or $1,300,000 per annum, which the Interstate Commerce Commission finds to be the approximate measure of the revenue discrimina-

tion against interstate commerce resulting from petitioner's present multiple and commutation fares.

28. The Commission's ultimate findings, as set forth in said report, are as follows:

> "1. That petitioner has not shown that its proposed increased minimum fare on interstate traffic will be just and reasonable.
>
> 2. That in connection with its minimum and round-trip suburban fares petitioner has not shown any person-locality or revenue discrimination against interstate commerce.
>
> 3. That petitioner's present multiple and commutation fares do not produce sufficient revenue to cover the cost of providing the service for the current revenue travel thereunder, including a reasonable return on the rate-making value of the property devoted to such service.
>
> 4. That such multiple and commutation fares for intrastate travel between stations on petitioner's suburban lines within the State of Illinois, made or imposed by authority of that State, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of the provisions of paragraph (4) of section 13 of the Interstate Commerce Act.
>
> 5. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel the multiple and commutation fares on the bases set forth as prescribed in the appendix hereto.
>
> 6. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary for the future in order that the travel thereunder may make a fair contribution to the revenues needed by petitioner to meet its increased operating expenses due to increases in wages and in prices of materials and supplies and to enable it, under honest and efficient management, to provide adequate

and efficient service at the lowest cost consistent with the furnishing of such service.

7. That such prescribed fares will remove any person-locality discrimination against interstate commerce which may exist in connection with petitioner's present multiple and commutation fares."

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. The Interstate Commerce Commission has been vested by the Congress of the United States, in section 13 (3) and (4) of the Interstate Commerce Act (49 U.S.C., sec. 13 (3) and (4)), with jurisdiction and power to determine whether any intrastate rate, fare, or charge, imposed by State authority upon any common carrier by railroad engaged also in interstate commerce and hence subject to the provisions of the Interstate Commerce Act, Part I, causes either (a) undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or (b) undue, unreasonable or unjust discrimination against interstate or foreign commerce, and if, in any investigation instituted by the Interstate Commerce Commission upon petition of the carrier concerned, it finds, after full hearing, that any such rate, fare, or charge causes any such advantage, preference, prejudice, or discrimination, to prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged which will, in its judgment, remove such advantage, preference, prejudice, or discrimination, such rate, fare, or charge so prescribed to be observed while in effect by the carrier party to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

3. The Interstate Commerce Commission, in the aforesaid proceeding instituted pursuant to the petition of the Illinois Central Railroad Company under the provisions of section 13(3) of the Interstate Commerce Act, has properly exercised the jurisdiction conferred upon it by section

13(4) of that Act and has determined that petitioner's prevailing intrastate suburban multiple and commutation fares are not producing their fair share of the earnings required to enable petitioner to meet its maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate, and that in consequence thereof said fares are discriminatory, revenuewise, against its interstate traffic as a whole, and that said fares cause, and, unless increased to the extent specified by the Interstate Commerce Commission in the order here involved, will continue to cause, undue, unreasonable, and unjust discrimination against interstate commerce, in violation of the provisions of section 13(4) of the Interstate Commerce Act.

4. Upon consideration of the entire record of the evidence introduced before the Interstate Commerce Commission, the Court finds that said evidence is substantial and amply supports each of and all of the ultimate findings and subsidiary findings set forth in the report of the Interstate Commerce Commission of July 30, 1951.

5. The findings of the Interstate Commerce Commission as referred to hereinabove and its other findings appearing in its aforesaid report of July 30, 1951, are adequate to support its order.

6. The report and order of the Interstate Commerce Commission of July 30, 1951, do not violate the provisions of the Tenth Amendment or other provision of the Constitution of the United States, are within and do not exceed the powers delegated to the Interstate Commerce Commission by statute, and do not constitute an exercise of power in itself or in the manner of its exercise so arbitrary and capricious as to transcend the authority conferred upon said Commission.

7. The Interstate Commerce Commission did not act arbitrarily, unlawfully, or beyond the scope of the authority vested in it by section 13 (3) and (4) of the Interstate Commerce Act in not dismissing the petition filed with it under section 13(3) on March 3, 1950, by the carrier involved, pending a final determination by State authority of the rates to be charged on petitioner's suburban system.

8. The Interstate Commerce Commission did not err or

act arbitrarily or unlawfully, or beyond the scope of its authority, in prescribing rates which it found will be just and reasonable for the future, will produce substantial additional revenue, and are necessary for the future in order that the travel thereunder may make a fair contribution to the revenues needed by petitioner to meet its increased operating expenses due to increases in wages and in prices of materials and supplies and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service, and to remove the undue, unreasonable and unjust discrimination found by the Interstate Commerce Commission to be caused by the present multiple and commutation fares of the petitioning carrier, made or imposed by authority of the State.

9. The order in question is within the statutory powers of the Interstate Commerce Commission, which powers were properly exercised after full hearing in the proceeding culminating in the order here involved, without error in the application of the rules of law, and the order is valid in every respect.

10. Unjust discrimination against interstate commerce is a matter of National and not exclusively local concern, and whether intrastate rates cause such discrimination is properly for determination by the Interstate Commerce Commission.

11. The pendency of a suit in the local courts of the State of Illinois to set aside a report and order of the Illinois Commerce Commission which refused to permit the Illinois Central Railroad Company to make any changes or increases in its presently existing suburban fares in the Chicago area did not in any manner affect the power or jurisdiction of the Interstate Commerce Commission under Section 13 (3) and (4) of the Interstate Commerce Act; and it was within the power of the Interstate Commerce Commission, and it was its duty, having found upon substantial evidence the existence of an unjust discrimination against interstate commerce, caused by the suburban fares in question which had been made and imposed under authority of the State of Illinois, to prescribe the rate or fare to be

charged in the future in order to remove such unjust discrimination.

12. The injunction should be denied and the complaint should be dismissed.

ENTER:

PHILIP J. FINNEGAN,
United States Circuit Judge
WILLIAM J. CAMPBELL,
United States District Judge
J. SAM PERRY,
United States District Judge

Dated:

OCTOBER 31, 1951.

APPENDIX B

§ 13(3) and 13(4) of the Interstate Commerce Act (Chap. 91, § 416, 41 Stat. 484):

(3) "Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought to issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action

taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter."

(4) "Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Office-Supreme Court, U. S.
FILED
DEC 28 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 498

CITY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

JOHN J. MORTIMER,
Corporation Counsel of the City of Chicago,
JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel of the City of Chicago,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1316

STATE OF ILLINOIS AND THE ILLINOIS COMMERCE COMMISSION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND ILLINOIS CENTRAL RAILROAD COMPANY,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, intervenor-appellant, submits this statement discussing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of Illinois, Eastern Division, has not been reported as of this date. A copy of the Memorandum, Findings of Fact, Conclusions of Law, and Order is attached as Appendix A to the Statement as to Jurisdiction heretofore filed in this cause by the plaintiffs-appellants State of Illinois and Illinois Commerce Commission.

Jurisdiction

The judgment of the District Court was entered on October 31, 1951. A petition for appeal is presented to the District Court, for the Northern District of Illinois, Eastern Division, herewith on this date, namely, November 30, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case (*North Carolina* v. *United States*, 325 U. S. 507; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475).

Questions Presented

A. May the Interstate Commerce Commission, acting under Sections 13(3), 13(4) and 15(a) of the Interstate Commerce Act to remove an unreasonable discrimination against interstate commerce and intrastate rates, prescribe rates which, although their total effect on the revenue of the carrier is reasonable, discriminate against one group of the carrier's passengers in favor of another group?

B. Did the Interstate Commerce Commission ignore the duty to make findings and conclusions on all material issues imposed under Section 8(B) of the Administrative Procedure Act and thus render its order void by failing to determine whether or not the basis for the carrier's suburban fares, adopted in its report of July 30, 1951, discriminated against certain of the carrier's passengers?

C. Was the order of the Interstate Commerce Commission with respect to the basis for the multiple fares to be charged by the carrier so inconsistent, vague and insufficiently related to the record on its face as to render it void?

D. Was a determination by the Commission that the fares were just and reasonable, in the face of uncontradicted

evidence that the groups of passengers receiving the largest percentage increases under such fares were those to whom service was rendered at a profit and who had competitive transportation facilities available, sufficiently supported by substantial evidence as to be valid against the contention that the fares so prescribed were unreasonably discriminatory?[1]

Statutes Involved

Sections 7(1), 13(3), 13(4) and 15(a)(2) of the Interstate Commerce Act, as amended [49 U. S. C. §§ 3, 13, 15(a)], and Section 8(B) of the Administrative Procedure Act [5 U. S. C. § 1007 (B)] are set forth in Appendix A hereto.

Statement

Appellant in this separate appeal, intervenor below, is the City of Chicago, a municipal corporation, whose right to intervene in these proceedings, is established by Section 2323 of the Judicial Code, as amended (28 U. S. C. Section 2323). As more fully appears from the intervening petition of the City of Chicago filed in the court below, the intervenor represents itself, in its corporate capacity, as a user of the carrier's services and in a representative capacity, those of its residents who are users of the carrier's suburban service.

The railroad is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the City of Chicago, County of Cook and State of Illinois. It is engaged, as a common carrier by rail, in the business of providing both intrastate and interstate line-haul, steam and industrial power passenger and freight transportation service, and in operating a separate, wholly intrastate, electrified suburban passenger

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[1] All points raised in the assignment of errors are also presented. The Questions Presented stated above set forth the major issues.

transportation service in the southern portion of the City of Chicago and certain suburbs south of said City. This system, situated entirely within the County of Cook, in the State of Illinois, provides local transportation service between the center of the City of Chicago and its south and southeastern areas together with certain suburban towns located south of the city limits. In the year 1949 more than 31,000,000 or approximately 83 per cent of its suburban passengers were entirely local to Chicago; approximately 63 per cent of its road miles of track used in suburban service are located inside the corporate limits of the City of Chicago. Within the City of Chicago its suburban system operates in competition with other forms of local transportation.

On March 3, 1950, Railroad filed a petition with the Interstate Commerce Commission praying that the Interstate Commerce Commission find that the existing round-trip, commutation, and multiple rate fares on Railroad's intrastate suburban system constituted a burden on interstate commerce in violation of Sections 3, 13 and 15a of the Interstate Commerce Act, and that the Commission require a removal of such burden through the approval of the rates, fares and charges proposed by Railroad in its petition. The multiple-ride fares therein proposed were to be determined by a formula based on a prescribed percentage of the one way fare between stations multiplied by the number of rides indicated on the face of the multiple-ride ticket; the prescribed percentages decreased as the distance traveled increased. The Interstate Commerce Commission assigned Docket No. 30560 to this proceeding, designating it "Illinois Central Multiple Fares in Chicago Area," and, after disposing of certain preliminary motions, set the matter for hearing on May 8, 1950 at Chicago, Illinois. The plaintiffs and intervenors in the Court below, including the City of

Chicago, along with others, participated in these proceedings before the Commission.

The evidence adduced at the hearings indicated that the fares proposed by Railroad would result in increased net revenue to it of approximately $2,000,000.00, as opposed to an operating deficit of $335,000.00 attributable to the suburban system under the then current rates. Railroad's own evidence indicated that during the test year of 1949, the operation of the suburban system, to and from points south of the corporate limits of Chicago had resulted in a deficit of approximately $238,500.00 whereas the operations between points within the corporate limits of Chicago had shown a net operating income of $1,302,901.43 during the same period. Further testimony indicated that such operation south of the limits of the City of Chicago had never been profitable. It was further established that Railroad's suburban system encountered its heaviest competition from other local transportation systems within the City of Chicago. The record is devoid of evidence on the comparative costs of short and long run trips over Railroad's suburban system, and no other evidence was offered in explanation of the formula for determining multiple-ride fares proposed by Railroad.

After the conclusion of the hearings, the Trial Examiner for the Interstate Commerce Commission filed and served upon the parties, in accordance with the Commission's practice, a proposed report of the Commission. In response to this report, the City of Chicago, among others, filed exceptions to it with the Commission. These exceptions by the City of Chicago raised questions concerning the unjustly discriminatory character of the multiple-ride fares, determined through the use of diminishing percentage factors, the lack of basis in the evidence for the use of such factors, and the absence of essential findings on this issue.

On July 30, 1951 a report and order were entered by the Interstate Commerce Commission in which the Railroad was authorized increased multiple-ride and commutation fares, calculated on the basis proposed by Railroad but subject to certain maxima imposed by the Commission. These increases were calculated to produce an increase of approximately $1,300,000 in Railroad's gross revenue, this being the amount by which the Commission found necessary to remove the alleged discrimination against interstate commerce. The only reference which the order of July 30, 1951 contained to the use of the fare formula is the unadorned statement that increased fares on the basis proposed by Railroad will result in the production of the necessary additional revenue. In Appendix I of the report the formula, including the precise percentages to be used, is set out together with the method of determining the maxima imposed by the Commission on the fares to be charged under the formula. Appendix I also prescribes certain definite fares to be charged, but the report contains no reference to these fares. Moreover, these prescribed fares are in some instances the maxima where the formula produces a lower fare, and, in others, an intermediate figure. The order was approved by seven of the eleven Commissioners and was served, together with the report, on August 8, 1951.

On August 17, 1951 the State of Illinois and the Illinois Commerce Commission brought an action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission for the reason that the order exceeded the lawful authority and jurisdiction of that Commission. The City of Chicago intervened in that proceeding, adopting the Complaint of the original plaintiffs, and, asserting, in its intervening

petition, as additional grounds for the relief prayed for, that the fares prescribed discriminated against short distance riders, that the order of the Interstate Commerce Commission did not contain findings as required with respect to the discriminatory character of the prescribed fares, and that the order was inconsistent on its face. The three-judge District Court assigned to hear the matter entered an order on October 31, 1951, denying the application for a permanent injunction and dismissing the complaint. Thereafter, on, to wit, November 16, 1951, the original plaintiffs, State of Illinois and Illinois Commerce Commission, took a direct appeal, raising the question of the authority and jurisdiction of the Interstate Commerce Commission. Appellant, City of Chicago, takes this direct appeal for the purpose of having reviewed the order of the District Court previously referred to with respect to its contentions before that Court.

The Questions Are Substantial

1

The first question presented raises for the first time before this Court the issue of whether or not there are limitations, express or inherent, in the Interstate Commerce Act upon the manner in which the Interstate Commerce Commission may exercise the jurisdiction conferred upon it by Section 13(4) of the Act to fix intrastate rates to remove a burden on interstate commerce. Under Section 13(3) of the Act, a carrier is permitted to file a petition with the Interstate Commerce Commission alleging such a burden exists. If, after investigation and hearing, the Interstate Commerce Commission determines that an unreasonable discrimination against interstate commerce exists, it is empowered, pursuant to Section 13(4) of the

Act, to prescribe fares or maxima and minima to be charged to remove such discrimination.

Prior to the enactment of the Transportation Act in 1920, the primary purpose of the Interstate Commerce Act was to prevent what are described as "person-locality" discriminations.

With the addition of Section 15(a) to the Interstate Commerce Act, by the Transportation Act of 1920, however, the Interstate Commerce Commission was given the power to prescribe rates which would insure a fair return to the regulated carriers without regard to the existence of so-called "person-locality" discriminations. Shortly after the addition of Section 15(a) to the Act, this Court determined that where intrastate rates did not produce their fair share of the necessary revenue under Section 15(a), the Interstate Commerce Commission had jurisdiction to achieve that result under Section 13(4), *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563 (1922). In its report of July 30, 1951, it is clear that the Interstate Commerce Commission was exercising the power conferred under Section 15(a) of the Interstate Commerce Act. Exercise of this power results in a determination of the reasonableness of the rate.

This Court has recognized that the questions reasonableness and discrimination are separate and distinct. In *United States* v. *Chicago M. & St. P. R. Co.*, 294 U. S. 499, 506 (1935), Mr. Justice Cardozo pointed out that the question of unreasonableness is concerned with a determination of the maximum beyond which the rates are excessive and the minimum beyond which they become confiscatory. He then holds that the carrier is free to set its rates within those limits except where the rates so set would result in an undue preference or discrimination. In *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573 (1949) this court held

that, as against the carriers, the Interstate Commerce Commission had the power to fix and enforce definite, non-discriminatory rates even though the rates prescribed by the carriers were, in themselves, reasonable.

Since the essence of the original Interstate Commerce Act is the prevention of discrimination and the granting of preferences to certain localities is forbidden to carriers by Section 3(1) of the Interstate Commerce Act, it is implicit that the Interstate Commerce Commission may not, in providing a fair return to Railroad under Section 15 (a) of the Act through the exercise of its jurisdiction over intrastate rates pursuant to Sections 13(3) and 13(4) of the Act, prescribe rates which would be unjustly discriminatory and unduly preferential as between various classes of intrastate passengers of Railroad's suburban system, and which would warrant a separate proceeding before the commission if such rates were filed by Railroad itself. Yet the adoption of the formula involving the use of diminishing percentage factors for the determination of Railroad's multiple-ride fares by the Interstate Commerce Commission as proposed by Railroad has exactly that effect, ignoring the fact that, under the law, a rate must meet the two separate tests of reasonableness and unlawful discrimination.

2

The fact that the Report of the Interstate Commerce Commission of July 30, 1951 made no findings with respect to the non-discriminatory character of the multiple-ride fares therein prescribed, despite the fact that the question was presented to it by the evidence and by the exceptions of the City of Chicago to the Examiner's Proposed Report, also renders this case unique. Section 8(B) of the Administrative Procedure Act requires that the report of an administrative agency contain findings and conclusions, together with an indication of their basis in the record, on

all material issues presented. This Court has held that, even independent of the requirements of the Administrative Procedure Act, the Interstate Commerce Commission is required to make findings to support its orders, *Atchison T. & S. F. R. Co.* v. *United States*, 295 U. S. 193 (1935).

Most of the cases previously before this Court have been concerned with the requirement of precision in findings or with the question as to whether or not the findings therein alleged to be absent were sufficiently basic in character to warrant invalidation of the order. (Compare: *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475 (1941); *Florida* v. *United States*, 282 U. S. 194 (1930) with *United States* v. *Florida*, 292 U. S. 1.) This case, however, presents the applicability of the requirement of findings in a proceeding before the Interstate Commerce Commission where both the issues of the unreasonable and the discriminatory character of the fares proposed by the petitioning Railroad were before the Commission, and the Commission, while making findings with respect to the proposed rates, was completely silent on the issue of unlawful discrimination.

Although it was briefly contended below that the findings of the Commission did cover this issue, the unsoundness of such contention is demonstrated by reference to the fact that all of the findings of the Interstate Commerce Commission in its order of July 30, 1951 referred to the reasonableness of those rates whereas unlawful discrimination is an entirely separate issue and can exist in reasonable rates.

3

The multiple-ride fares presented by the Interstate Commerce Commission in its Report of July 30, 1951, to which neither the formula nor maxima set forth therein were applied, presents another instance in which this Court is asked to ascertain the standards of certainty requisite to a valid administrative order. This Court has stated, *Carolina*

Freight Carriers Corp. v. *United States*, 315 U. S. 475, 489 (1941), that Judicial Review is provided as an assurance that the standards laid down by Congress for the exercise of administrative power will not be violated, and where the inquiry as to whether or not those standards have been violated is halted because the findings do not disclose what standards were applied, that review becomes perfunctory.

Clearly, where there is an unexplained inconsistency within the report of the administrative body as in the order of July 30, 1951, a question is raised as to its basis, either in law or fact. Therefore, it is impossible to determine whether or not the applicable standards were applied, and judicial review is impossible. Thus the case again presents this Court with the problem of preserving effective judicial review of the actions of administrative agencies.

The fact that the record is devoid of evidence justifying the use of the diminishing percentage factors in the multiple-ride fares, but contains evidence that those areas on Railroad's suburban system which receive the benefit of lower percentages did not contribute their fair share to Railroad's revenues under the existing rates, presents a problem regarding the substantial evidence rule. This Court has repeatedly held that the findings of administrative agencies must be supported by substantial evidence in the record, *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156 (1938). Recently, in *Universal Camera Co.* v. *National L. R. B.*, 340 U. S. 474 (1951), this Court pointed out that the court on review of an administrative determination is permitted to examine the whole record and determine whether the evidence in support thereof is substantial on that basis.

As a result of the situation above referred to, this case presents the question of the applicability of the *Universal Camera Co.* decision to a decision where, at best, only vague

inferences from the evidence support the order of July 30, 1951 and direct evidence, along with strong inferences from it, indicate that an exactly opposite situation to that required to validate the order of the Interstate Commerce Commission exists. Logically, under the substantial evidence rule as interpreted in *Universal Camera Co.* v. *National L. R. B.*, 340 U. S. 474 (1951) the Court below should have found that substantial evidence did not support the order of July 30, 1951 on the question of whether or not the fares were unlawfully discriminatory against short-run passengers of Railroad's suburban system. Because of the absence of definite findings in the District Court on this point and the additional problems presented by the application of *Universal Camera Co.* v. *National L. R. B.*, 340 U. S. 474 (1951), the question is presented to this Court.

Conclusion

For the reasons stated above, it is submitted that the questions presented by this appeal are of public importance and fully justify review by this Court of the judgment of the District Court in this cause.

Respectfully submitted,

JOHN J. MORTIMER,
Corporation Counsel,
JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel,
Counsel for the City of Chicago,
Intervenor-Appellant.

Date: November 30th, 1951.

APPENDIX "A"

Interstate Commerce Act

Section 3, par. (1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsover.

Section 13, par. (3) *Investigation involving State regulations; conference of State and interstate commissions.* Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter.

Section 13, par. (4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a. *Fair return for carriers.*

* * * * * * *

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need in the public interest of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

ADMINISTRATIVE PROCEDURE ACT

Section 8. *Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.*

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * * * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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FILED
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CHARLES ELMORE CR
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No. 497

In the Supreme Court of the United States

OCTOBER TERM, 1951

STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION, ET AL., APPELLANTS

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 51-C-1316

STATE OF ILLINOIS and THE ILLINOIS COMMERCE COMMISSION, *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ILLINOIS CENTRAL RAILROAD COMPANY, *Defendants-Appellees.*

MOTION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the decree of the District Court be affirmed.

This is a direct appeal from the final decree entered on October 31, 1951, by a three-judge Court constituted pursuant to 28 U.S.C. 2284, 2325, dismissing appellants' petition to set aside an order of the Interstate Commerce Commission. Appeal was allowed November 16, 1951, and the appeal papers were served on November 20, 1951.

The Commission's report, entered July 30, 1951, in No. 30560, *Illinois Central Multiple Fares in*

Chicago Area, 281 I.C.C. 537, finds that the multiple and commutation fares of the Illinois Central Railroad Company for intrastate travel between stations on its suburban lines within Illinois, made or imposed by authority of that State, cause, and, unless increased to the extent set forth in said report, will continue to cause undue, unreasonable and unjust discrimination against interstate commerce, in violation of section 13(4) of the Interstate Commerce Act (49 U.S.C., sec. 13(4)).[1] The order of the same date directs the carrier to cease and desist from practicing such discrimination.[2]

Having found such discrimination to exist, it thereupon became the duty of the Commission, under Section 13(4), to prescribe the rate, fare, or charge which, in its judgment, would remove such discrimination. In performance of this duty, the order directs the carrier to establish and maintain for intrastate travel between points in Illinois on its suburban lines 10-trip, 25-trip and 50-trip (twin-25) multiple fares, weekly commutation fares, and restricted and unrestricted monthly

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[1] The suburban service is operated between downtown Chicago and Richton, Ill., 28.3 miles, and over two branches, one from 37th Street to South Chicago, 4.9 miles, and one from 115th Street (Kensington) to Blue Island, Ill., 4.3 miles, all within the State of Illinois. For further description of the suburban service see report, *supra,* pp. 538-540

[2] A typewritten copy of the report appears as Exhibit H of the complaint. The report is now officially printed, 281 I.C.C. 537. A copy of the order is attached to Exhibit H following the appendices thereto opposite sheet 25.

commutation fares on the bases set forth as "prescribed" in the Appendix to the report (pp. 555-556).

Background and Nature of the Proceedings

Due to decrease in patronage of its suburban service[3] and sharp increases in the expense of operating the service,[4] the Illinois Central experienced a marked decline in its net revenues for the operation of this service in the post-war period. In 1948 the suburban service produced a small net operating income but beginning in 1949 it has been operated at a deficit. For the year 1949 the deficit was approximately $335,000; since then the deficits have grown.[5] An effort to effect economies in the service, such as the discontinuance of certain trains in the non-rush hours, failed to offset the mounting expenses (Tr. 28-30).[6]

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[3] The decline in 1946-49 was as follows (Exhibit 2, p. 38):

Year	*Suburban Passengers Carried*
1946	47,067,959
1947	46,357,058
1948	43,043,097
1949	37,895,715

[4] These increases were due to increases in wages, and in prices of materials and supplies. (Report, p. 553) The record is replete with evidence showing these facts. The recent general increases in wages and prices is a matter of every-day, common knowledge.

[5] For the first seven months of 1950, the deficit was $458,807.20. (Ex. 31)

[6] Herein citations of this kind refer to the page number of the typewritten transcript of the hearings before the Interstate Commerce Commission; and references to exhibits refer to the exhibits introduced at said hearing.

In January 1950 the carrier decided to seek increases in the suburban revenues by changes in the ticket set-up and increases in the fares. It decided to ask authority to discontinue the issuance of round-trip tickets for its suburban service and in lieu thereof to provide two one-way tickets at double the one-way fare; and to cancel all then existing commutation and multiple fares and to substitute in lieu thereof three types of multiple-fare tickets at prices predicated upon an increased rate level bearing a definite relation to its one-way fare of 2½ cents per mile.[7]

On March 3, 1950, the Illinois Central filed a petition with the I.C.C. under section 13(3) of the I.C. Act, alleging that its round-trip, commutation, and multiple-ride fares for intrastate transportation within the Chicago suburban area resulted in both person-locality and revenue discrimination in violation of section 13(3) and (4) of the I.C. Act. The petition asked the Commission to institute an investigation under section 13(3) and by appropriate order under section 13(4) require

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[7] Commutation fares are weekly or monthly fares, payable in advance, with a diminishing rate of progression, and generally made with no fixed relation to, and on the average lower than, the basic coach fares.—279 I.C.C. 782. The basic coach fares of the Illinois Central, for interstate journeys on its system, as well as for intrastate journeys within Illinois, are 2.5 cents per mile, minimum 15 cents, with round-trip fares made 180 percent of the one-way fare. Multiple fares are fares for 10 or more rides generally made on a fixed relation to the basic coach fares and hence not on a diminishing basis except for the short hauls where the minimum coach fare comes into play.—279 I.C.C., 784.

the removal of the alleged violations of the Act by authorizing and requiring the elimination of petitioner's round-trip tickets and fares therefor and the establishment, in lieu of its existing commutation and multiple-ride tickets and the fares applicable thereto, 10-ride, 25-ride and 50-ride (twin-25) tickets at increased fares.

At the time of the filing of that petition the Illinois Central issued 9 types of tickets applicable to its suburban service, as shown in the tabulation on page 541 of the report which also shows the number of each type of ticket sold during 1949 and the revenues therefrom.

The I.C.C. conducted extensive hearings on the petition beginning on May 11, 1950 and continuing for 25 days thereafter. The parties later submitted briefs and an examiner's proposed report (Exhibit F to complaint) was issued and the matter was orally argued before the I.C.C.

On July 30, 1951, the I.C.C. adopted its report and order containing its findings of fact, conclusions, and decisions in the premises. In respect of the question of its jurisdiction in the premises, which had been extensively briefed and argued by the parties, the Commission said (p. 538):

> "* * * Our jurisdiction depends on whether under section 13 of the act findings of person-locality or revenue discrimination, or both, are warranted by the evidence which we will now proceed to discuss under appropriate headings."

The Commission thereupon gave a brief description of the carrier's suburban service (pp. 538-540), followed by a statement of the carrier's present and proposed fares (pp. 540-542). It then considered at some length the comprehensive evidence of record respecting the cost to the carrier of performing the suburban service, discussing and ruling upon the various contentions concerning that question, and it also made findings respecting the operating revenues produced by the suburban service (pp. 542-546). The Commission's ultimate conclusion in this regard (p. 546) was

> ". . . that the cost (operating expenses and taxes) incurred by petitioner in 1949, ascribable to its suburban service, as reasonably as may be approximated, exceeded its revenues for that year by about $335,000."

The Commission then considered and ruled upon a contention to the effect that maintenance of the suburban properties in 1949 was abnormal (pp. 546-547), followed by findings and a ruling upon a contention concerning non-revenue passengers carried in the suburban service (p. 547). It then considered and ruled upon the voluminous evidence of record concerning the value of the property devoted by the carrier to its suburban service. While the final value as estimated by the carrier was $46,377,838, the Commission found that,

> "Giving due consideration to all the evidence as to elements of value, we find that, for

> the purposes of these proceedings, the value of petitioner's property devoted to the suburban service is about $35,000,000. . . ." (P. 548.)

In concluding the subject of the value of the property and a reasonable return thereon, the Commission made the following comprehensive finding (pp. 548-549):

> "In 1949 petitioner earned on its entire system a net railway operating income of about $25,000,000, yielding a return of 3.23 percent on its estimated rate-making value, and 4.4 percent on its recorded investment less depreciation. Even given full consideration to protestants' criticisms as to general expenses, normal maintenance, and non-revenue passengers, the return from this suburban service is far lower than that from petitioner's system operations and, under the fares approved herein, will still be somewhat lower than the return from its non-suburban operations."

The report thereupon sets forth, with brief discussion, the general conclusions reached (pp. 549-552), to which attention is invited. The Commission did not approve the carrier's proposal to increase its minimum suburban fare from 15 to 20 cents nor to cancel its round-trip fares of 180 percent of the one-way fare. The Commission then considered the carrier's proposals concerning the multiple and commutation fares. It approved the 10-trip, 25-trip and 50-trip multiple fares proposed by the carrier except that these fares are to be sub-

ject, respectively, to maxima of 5, 11½ and 23 times the corresponding round-trip fares. Table I in the Appendix to the report (p. 555) shows representative present, proposed and prescribed multiple fares.

The Commission disapproved the carrier's proposal to abolish its commutation fares entirely and substitute the proposed 50-trip multiple fares therefor and the Commission prescribed weekly and monthly commutation fares. The report contains the following general statements concerning commutation service and fares (pp. 549-550):

> "* * * We have said that commutation service is among the services and commodities which should make less than the average contribution to constant costs and return on the rate-making value, and that the fares thereon should grade up less rapidly with increasing distances than the basic or multiple fares. Commutation service occurs usually during the rush hours and therefore the cost, as well as the value, of the service per passenger mile diminishes with increasing distance much more rapidly in the case of commuter service than in the case of travel under the basic or multiple fares."

"A commutation fare structure," the Commission found, p. 550, "can and should be devised in this proceeding which will accord with established principles and actually be used by the commuters and be fair to them and their communities, and, at

the same time accord petitioner the increased revenue therefrom of which it is in need."

The State of Illinois, the Illinois Commerce Commission and other protestants, in opposing the proposal of the carrier, pointed out that in 1949 the carrier incurred a deficit from its entire passenger train service of about $13,000,000, an amount much greater, absolutely and relatively, than the deficit incurred from its suburban operation, and that the latter are intrastate and largely intracity and separate and substantially different from its interstate operations. In respect of this argument the Commission repeated its former expressions that the passenger train business may not be excused from contributing the greatest possible earnings consonant with adequate service and reasonable charges and that the railroads must exert every legitimate effort to place this branch of their operations on a more compensatory basis.[8] To this end said petitioner and other railroads of the country have recently sought increases in their mail and express revenues (p. 550). The Commission further said (pp. 550-551): "The fares prescribed herein will be lower than the basic fare applying over petitioner's lines generally, will result in substantially increased revenue, and are necessary to enable petitioner to earn an adequate return over

[8] During the year 1949 the deficits in passenger operations of class I railroads of the United States aggregated approximately $649,000,000.—See Annual Report of I.C.C. to Congress for 1950, pp. 1, 5.

and above the cost of carrying the travelers thereunder so that it may maintain its well-being and be in a position to attract capital, in other words, so that its suburban operations may be self-supporting and have a long-term survival value; otherwise the burden of supporting the suburban operations must rest largely on petitioner's interstate freight traffic. The fact that its suburban operations are largely separate and distinct is all the more reason why they should stand on their own feet and not lean for support on its interstate freight operations. See *Colorado* v. *United States*, 271 U.S. 153. If possible, its interstate passenger travel should also be made more nearly self-supporting. However, its basic passenger fare is already the same as we have approved for other railroads in the South and West and is generally much higher than its suburban fares, present, proposed, or approved herein. The fact that even with such higher fares petitioner cannot make money or at least so far has been unable to make money on its other passenger train service is no reason for depriving it of an opportunity to make money on its suburban operations."

In finding the multiple and commutation fares in question to be discriminatory against interstate commerce and that it is not only within the Commission's power but it is its duty to require the discrimination to be removed, the Commission said (p. 551):

"Petitioner's multiple and commutation fares are not producing their fair share of the earnings required to enable petitioner to meet its maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate, and hence are discriminatory, revenuewise, against its interstate traffic as a whole. Under the circumstances, it is not only within our power, but it is our duty to require the discrimination to be removed. *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563; *Florida* v. *United States*, 282 U.S. 194, 212, 214; *Florida* v. *United States*, 292 U.S. 1, 5; *North Carolina* v. *United States*, 325 U.S. 507, 514-515."

The Commission thereupon proceeded to consider and to reach a conclusion respecting the fares to be prescribed in order to remove the unjust discrimination found to exist. It said (pp. 551-552):

"In *Commutation Fares between Chicago and Wisconsin, supra*, [279 I.C.C. 773] and related State proceedings[s], we prescribed for the Chicago and North Western Railway Company 10 and 25-trip multiple fares made 5 and 11½ times the corresponding round-trip fares and we and the Illinois Commission approved unrestricted monthly commutation fares ranging from $3.85 for 3 miles, to $7.20 for 6 miles, and $19.20 for 29 miles. Giving due consideration to petitioner's [Illinois Central's] revenue needs, the nature, cost and value of its suburban service, and the history and comparisons of fares, we conclude that

the unjust discrimination herein found to exist can and should be removed by the establishment and maintenance of 10, 25, and 50-trip multiple fares on the bases proposed by petitioner, subject, respectively, to maxima of 5, 11½, and 23 times the corresponding round-trip fares, and of unrestricted monthly commutation fares ranging from $6 for distances of 6 miles and under to $17 for 29 miles, with weekly and restricted monthly fares made the customary 25 and 90 percent thereof, all as set forth in the Appendix hereto. The fares thus prescribed will average somewhat lower than those of the North Western and considerably lower than those approved for the eastern railroads, including the South Bend and New York Central Railroad Company in the Chicago area. See *Commutation Fares, Eastern Railroads, supra,* [278 I.C.C. 491] *New York State Commutation Fares, New Haven Railroad,* 279 I.C.C. 151, *New York Central Commutation Fares, Chicago and Ind.,* 279 I.C.C. 188, and *Chicago S.S. & S.B. Fares,* 279 I.C.C. 663."

The Commission then considered the question of the amount of additional revenue which the fares it then prescribed will yield. It then realized that the degree to which the suburban operations in question will be put on a more nearly compensatory basis by the fares approved and prescribed in the report can only be determined by experience. It pointed out, however, that the Supreme Court has held that the requirement of essential

findings as to revenues does not demand an impracticable exactness, that losses through inadequate rates can be shown satisfactorily even though proof of the precise extent of such losses are not available, and that it is only reasonable determinations that are required. *Florida* v. *United States*, 292 U.S. 1, 9. Thereupon the Commission made this finding (p. 552):

> "* * * The fares approved herein will yield a return after taxes of about 3.2 percent, and an average increase of about 20 percent or $1,300,000 per annum, which we find to be the approximate measure of the revenue discrimination against interstate commerce resulting from petitioner's present multiple and commutation fares."

The extent to which the fares prescribed are lower than those proposed is indicated roughly by the statement on p. 541 of the report that the carrier estimated that its proposed fares would yield an increase of about 30 percent, or $2,000,000 per annum, whereas the Commission finds that the fares it approves and prescribes will yield an average increase of about 20 percent or $1,300,000 per annum (p. 552).

The Commission's ultimate findings, seven in number, are set forth on pages 552-553 of the report and read as follows:

> "1. That petitioner has not shown that its proposed increased minimum fare on interstate traffic will be just and reasonable.

2. That in connection with its minimum and round-trip suburban fares petitioner has not shown any person-locality, or revenue discrimination against interstate commerce.

3. That petitioner's present multiple and commutation fares do not produce sufficient revenue to cover the cost of providing the service for the current revenue travel thereunder, including a reasonable return on the rate-making value of the property devoted to such service.

4. That such multiple and commutation fares for intrastate travel between stations on petitioner's suburban lines within the State of Illinois, made or imposed by authority of that state, cause and unless increased to the extent herein set forth will continue to cause undue, unreasonable and unjust discrimination against interstate commerce, in violation of the provisions of paragraph (4) of section 13 of the Interstate Commerce Act.

5. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel the multiple and commutation fares on the bases set forth as prescribed in the Appendix hereto.

6. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary for the future in order that the travel thereunder may make a fair contribution to the revenues needed by petitioner to meet its increased operating expenses due to increases

in wages and in prices of materials and supplies and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

7. That such prescribed fares will remove any person-locality discrimination against interstate commerce which may exist in connection with petitioner's present multiple and commutation fares."

The Commission's authority to remove discrimination against interstate commerce.

The Interstate Commerce Act confers plenary authority upon the Commission to regulate intrastate rates charged by interstate carriers where those rates cause (1) "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand," or (2) "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Section 13(4). Section 13 orders removing discriminations caused by intrastate rates have been repeatedly sustained by this Court.[9] In upholding the Commission's authority

[9] *Wisconsin Railroad Commission* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563; *New York* v. *United States*, 257 U.S. 591; *Georgia Commission* v. *United States*, 283 U.S. 765; *Louisiana Commission* v. *United States*, 284 U.S. 125; *Louisiana* v. *United States*, 290 U.S. 70; *Florida* v. *United States*, 292 U.S. 1; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474; *Ohio* v. *United States*, 292 U.S. 498; *Mississippi* v. *United States*, 307 U.S. 610; *Texas* v. *United States*, 337 U.S. 911; and *New York* v. *United States*, —— U.S. —, No. 346, this term, sustaining per curiam 98 F. Supp. 855.

in this respect, the Court stated in *Florida* v. *United States*, 292 U.S. 1, 5:

> "In *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563, 585-587, we reached the conclusion that the provision of sec. 13(4) for the removal of 'any undue, unreasonable, or unjust discrimination against interstate commerce' was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission 'to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.' Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an 'unjust discrimination against interstate commerce.' We concluded that these words in sec. 13(4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *United States* v. *Louisiana*, 290 U.S. 70, 75."

Appellants question the Commission's authority to remove unjust revenue discrimination against interstate commerce, such as here found to exist, on the grounds (1) that the suburban system of the Illinois Central is operated separately from the through business of the carrier and is located wholly within the State of Illinois and (2) that at the time the Interstate Commerce Commission entered its order there was pending before the courts of the State of Illinois a suit brought by the Illinois Central Railroad Company to review an order of the State Commission denying the proposed increases in their entirety.

1. ***The suburban service in question is operated by an interstate carrier and the intrastate fares for the service seem clearly to be subject to section 13 (3) and (4) of the Interstate Commerce Act notwithstanding that the suburban service performed thereunder is largely separate from the through passenger and freight traffic of the carrier.***

The Illinois Central is a carrier engaged in interstate, as well as intrastate, commerce. Its rails extend from Chicago, Ill., to New Orleans, La., to Council Bluffs, Iowa, and to many other points in various states. It provides both freight and passenger service, including suburban service in the Chicago area. (281 I.C.C., 538-540.) This suburban service is performed over separate tracks which for the most part are alongside of and parallel to the tracks used for through business, and occupy the same right of way.

The fact that in addition to separate tracks separate stations are also used for the suburban business is not of legal significance. These are merely matters of safety and convenience. It is not disputed that this suburban service is operated by and as an integral part of the interstate carrier. Cf. *Florida* v. *United States*, 292 U.S. 1, and 186 I.C.C. 157, 190. The fact that the suburban service is operated electrically while the through freight and passenger service used steam or deisel power is not of legal significance. Cf. *U.S.* v. *Village of Hubbard*, 266 U.S. 474.[10]

It is obvious, too, from the Commission's report, that the revenues and expenses, and profits and losses, from the operations of the suburban service are reflected in the general accounts of this interstate carrier.

Therefore, under pertinent decisions of the Supreme Court of the United States, the jurisdiction of Congress and of its agent, the Interstate Commerce Commission, attaches to the intrastate suburban service in question, at least to the extent of requiring removal of unjust discrimination against interstate commerce caused by unduly low intrastate rates applying thereto, notwithstanding the fact that it is operated almost

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[10] There was no occasion for the Commission to determine whether that part of the Illinois Central's system which is devoted to the Chicago area suburban service and electrically operated is an "interurban electric railroad". Section 13 (3) and (4) does not except such roads.

wholly separately from the carrier's through passenger and freight service.[11] See *Colorado* v. *United States*, 271 U.S. 153, and cases cited.

2. *No rule of law or principle of comity requires the interstate carrier to exhaust its remedies under State law before invoking section 13 (3) and (4) of the Interstate Commerce Act or that this Commision should stay its hand until the State Court has decided the carrier's appeal from the action of the State Commission.*

The pertinent facts in this regard are as follows. The Illinois Central, on March 30, 1950, filed tariffs with the Illinois Commission cancelling its commutation and multiple fares and substituting the same multiple fares which it proposed in its section 13 petition to the I.C.C. The State Commission suspended the operation of these tariffs and insti-

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[11] The following findings of fact appearing in the Commission's report are here pertinent. For the most part, the suburban tracks and station facilities are separate and distinct from the facilities used in the transportation of freight and through passenger traffic. The suburban tracks are used to a small extent by yard freight service. Shop facilities are used in common by the suburban system and the through freight and passenger system, particularly the Burnside shops, said shops consisting of passenger car, paint and repair shops, machine, mill, reclamation, diesel, boiler, and blacksmith shops, transfer tables, sidings, and many other necessary facilities used in an operation of that nature.

In addition, the suburban service uses certain interlocking plants, located at various points in the suburban area, and these interlocking plants are used jointly by suburban trains, through passenger trains, and freight trains.

The carrier's service over its suburban lines is largely confined to the transportation of intrastate suburban passengers, but the suburban service is also available to the carrier's through passengers as well as to those of its connections. In the last half of 1949, for example, 23 through tickets were honored on the IC suburban trains, 13 of which were interstate. (281 I.C.C., 540.)

tuted an investigation as to their lawfulness under the Illinois law. After extended hearings that Commission, by report and order dated February 28, 1951 (Exhibit D to complaint), refused to approve the proposed fares and ordered them to be permanently suspended and canceled in their entirety.[12] This action of the State Commission, it will be noted, was taken five months before the issuance of the report and order of the I.C.C. here involved. Shortly after the State Commission had issued its report and order of February 28, 1951, the Illinois Central took an appeal to the Circuit Court of Cook County to review the reasonableness and lawfulness of the State Commission's order (Exhibit E to complaint). At the time the I.C.C. issued its report and order of July 30, 1951, the proceeding in the Illinois Court was still pending. In view of these facts Commissioner Alldredge dissented, joined by Chairman Splawn and Commissioners Aitchison and Cross. (See report, pp. 553-554.) These commissioners were of the view that the principle of comity enunciated in *Alabama Commission* v. *Southern R. Co.*, 341 U.S. 341, applied to this section 13 proceeding and that the I.C.C. should defer to State authorities and stay its hand until the State Court finishes its determination of the issues.

Appellants urged in the Court below that the

[12] The record made before the Illinois Commission is virtually the same as that made before the I.C.C.

I.C.C. order is void because it was issued while the carrier's appeal to the State Court for review of the action of the State Commission was still pending. This contention was fully considered by the Court below and found to be wholly lacking in merit.

Though section 13 (4) was enacted over 31 years ago, as part of Transportation Act of 1920, and though its provisions have repeatedly been before the courts, including the United States Supreme Court in many cases, they have never been interpreted as requiring the federal Commission to withhold the relief they contemplate pending determination of proceedings before a State court, brought by the carrier involved, to review adverse action by the State Commission.

In *Alabama Commission* v. *Southern R. Co.*, 341 U.S. 341, it was clearly indicated that the case involved no question under section 13(4) of the Interstate Commerce Act. See footnote 9, p. 346, reading:

> "As the jurisdiction of the Interstate Commerce Commission under 49 U.S.C., sec. 13(4) has not been invoked for decision as to whether the continuance of this intrastate service constituted an undue discrimination against interstate commerce, we cannot, in this proceeding, consider any impact the order of the Alabama Public Service Commission might have on interstate commerce. *Western & Atlantic R.*

Co. v. *Georgia Pub. Serv. Comm'n*, 267 U.S. 493 (1925) and cases cited therein."

It is clear, we think, from holdings of the Supreme Court, that, in a case such as that at bar, where the Interstate Commerce Commission has found intrastate rates of an interstate carrier to be so low as to cause revenue discrimination against interstate commerce, the Commission should not stay its hand pending determination of proceedings in the State courts to review action of the State Commission, but should instead promptly grant the relief contemplated by the statute.

Such undelayed action by the Interstate Commerce Commission is in complete harmony with, and indeed is required by, the provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920 and subsequent additions to the Act, including the 1940 declaration of national transportation policy. Cf. *Wisconsin R.R. Comm.* v. *C., B. & Q. R. Co., supra*; *New England Divisions Case*, 261 U.S. 184, 189-190; *Schwabacher* v. *U.S.*, 334 U.S. 182, 193-194; *Florida* v. *U.S.*, 282 U.S. 194, 210-211; *Florida* v. *U.S.*, 292 U.S. 1.

CONCLUSION

This case is not different in principle from many previous section 13 cases in which this Court has upheld the validity of the Interstate Commerce Commission's order. The statutory court below, in a well-considered opinion, has found the Com-

mission's order to be fully supported by the evidence and free from error of law. It has made full findings of fact and conclusions of law. Its decree should be affirmed without oral argument.

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Interstate Commerce Commission.

DECEMBER 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952 983068 422

FILED
DEC 28

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 497

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY TO AFFIRM

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY

MOTION TO AFFIRM

Appellee Illinois Central Railroad Company, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the order of the District Court be affirmed.

This is a direct appeal from the final decree entered October 31, 1951, by a District Court of three judges specially constituted pursuant to 28 U. S. C. §§ 2254 and 2325, dismissing appellants' complaint which sought to set aside an order made by the Interstate Commerce Commission. Appeal was allowed November 16, 1951, and appeal papers were served November 19, 1951.

The issue in this appeal is the validity of the Commission's order of July 30, 1951, in its docket No. 30560, *Illinois Central Multiple Fares in Chicago Area*, 281 I. C. C. 537. By that order the Commission found that the then-existing fares charged by the Illinois Central Railroad Company for multiple-ride and commutation tickets in connection with the suburban passenger service rendered by it in the Chicago area, did not cover the full cost of providing the service and were so abnormally low as to constitute an undue, unreasonable, and unjust discrimination against interstate commerce in violation of § 13(4) of the Interstate Commerce Act. The Commission required the Illinois Central to cease and desist from practicing the discrimination found to exist, and required it to establish and maintain for future application fares on bases set forth in the report, which it found were necessary to remove the said discrimination.

It is submitted that the appeal presents no substantial questions, and that the order of the District Court should be affirmed without argument.

Appellants' Jurisdictional Statement indicates substantial agreement with the statement made in the District Court's opinion that this case involves two questions: (1) Did the Interstate Commerce Commission have the authority or power to enter an order on July 30, 1951, fixing the suburban fares of the Illinois Central, and (2) Did the Interstate Commerce Commission receive such substantial evidence as would support its findings, conclusions and order? Those two questions were considered by the District Court, which decided against appellants. In making its determinations the District Court was clearly right.

I. Jurisdiction

Proper consideration of the question of the jurisdiction and authority of the Interstate Commerce Commission

to issue its order, the validity of which is in issue on this appeal, requires a brief statement of the various steps taken in this litigation.

The Interstate Commerce Commission's order was issued in a proceeding conducted by the Commission as the result of two petitions filed with the Commission by the Illinois Central in February and March, 1950. Those two petitions alleged, among other things, that the suburban passenger operation of the Illinois Central in the Chicago area was being conducted on the basis of fares made and imposed by the Illinois regulatory authorities, that because of the unduly low basis of those suburban fares the Illinois Central's suburban operation was being conducted at a substantial net loss, and that the existing fares were consequently resulting in an undue and unjust burden on interstate commerce in contravention of the provisions of §§ 3, 13 and 15a of the Interstate Commerce Act. The petitions sought an investigation by the Commission into the matters alleged and ultimate entry of an order requiring increases in suburban fares in order to put an end to the unjust discrimination against interstate commerce. Pursuant to those petitions the Interstate Commerce Commission instituted the investigation sought and set the matter for hearing.

The Interstate Commerce Commission had previously said that:

> "There is no requirement of law that a complainant seeking relief under Section 13 of the act may not concurrently seek relief before the State regulating authorities. Indeed the provision in that section for joint hearings with the State regulating authorities clearly implies the prosecution of complaints before both State and interstate tribunals concurrently."[1]

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[1] *Asbury Transp. Co.* v. *Union Pac. R. Co.*, 248 I.C.C. 741, 745 (1942).

Therefore, the Illinois Central, on March 30, 1950, filed a tariff with the Illinois Commerce Commission containing increased fares as proposed in its petitions filed with the Interstate Commerce Commission. This tariff was suspended by the Illinois Commission and the matter set for hearing.

Hearings were held by both Commissions intermittently from May to November, 1950. Briefs and reply briefs were filed by all parties.

On February 28, 1951, the Illinois Commission rendered its decision in its case, finding that the fares proposed in the Illinois Central's tariff were not just and reasonable and ordering the tariff to be permanently suspended, cancelled and annulled. The Illinois Central complied with that order. The Illinois Central thereafter filed with the Illinois Commission an application for rehearing, which was denied. On April 4, 1951, the Illinois Central appealed the order of the Illinois Commission to the Circuit Court of Cook County, where the case is now pending. On September 28, 1951, the case was reassigned to a different judge for decision. The case has not been set for argument.

On July 30, 1951, the Interstate Commerce Commission issued the report and order which are the subject of this present proceeding before this Court.

In its report the Interstate Commerce Commission found, among other things, that the suburban operation of the Illinois Central is incurring a substantial deficit, that the intrastate suburban fares on which the operation is being conducted are substantially lower than the suburban fares of other railroads, and that the existing fares are resulting in a burden upon and unjust discrimination against interstate commerce in violation of § 13 of the Interstate Commerce Act. In its order the Commission prescribed a higher basis of suburban fares and ordered the Illinois Central

to establish fares on the prescribed basis on or before October 1, 1951.

Upon being served with the Commission's order, the Illinois Central, on August 9, 1951, filed its tariff containing the prescribed fares, in accordance with the requirements of the order, the effective date of the tariff being August 25, 1951.

On August 21, 1951, following the filing on August 17, 1951, of the complaint before the District Court, the Illinois Central postponed the effective date of the tariff to September 15, 1951.

On September 12, 1951, the District Court indicated its intention to grant a preliminary injunction pending its disposition of the case on the merits, whereupon the Illinois Central again postponed the effective date of its tariff to October 1, 1951. This obviated the necessity of the District Court's entering an injunctive order and none was entered. The case was argued before the District Court on the merits on September 26, 1951. At the conclusion of the argument, at the request of the Court, the effective date of the tariff was postponed to November 1, 1951, the Interstate Commerce Commission amending its order to permit such postponement.

On October 31, 1951, the District Court issued its decision, containing detailed Findings of Fact and Conclusions of Law, and dismissed the complaint. On November 1, 1951, the tariff of increased fares became effective.

The first question presented, stated on page 2 of appellants' Jurisdictional Statement, is whether the Commission had "authority under § 13(4) of the Interstate Commerce Act to issue an order prescribing intrastate commutation and multiple fares for the suburban system of the Illinois Central Railroad Company, located wholly within the State of Illinois, where such fares were heretofore main-

tained exclusively under the authority of the State of Illinois and where, with respect to the same fare proposals dealt with by the Interstate Commerce Commission in its order, there was pending before the courts of the State of Illinois an appeal taken by the Illinois Central Railroad Company to review an order by the Illinois Commerce Commission denying the proposed increases."

Appellants sought to make this same point in the District Court. The matter was covered fully in the briefs filed with that court, and the District Court discussed and rejected the contention at pages 3-12 of its decision as well as by Conclusions of Law 9, 10 and 11.

The District Court's conclusion on this point is clearly correct. Its decision contains a full discussion of the point. Rather than reiterate that discussion here, we respectfully refer this Court to the District Court's decision on the point as a statement of our position.

The contention which appellants make has several times been specifically rejected by the Supreme Court and the Commission. In *Emergency Freight Charges Within Georgia*, 213 I. C. C. 515 (1936), the carriers operating in Georgia had filed a petition with the Georgia Public Service Commission seeking increases in their intrastate freight rates. Within ten days they also filed a 13th section petition with the Interstate Commerce Commission seeking an order by that Commission requiring the increases in intrastate rates they were seeking by the petition they had filed with the Georgia Commission. The Georgia Commission claimed, as do plaintiffs here, that since the state regulatory processes had not been completed, the Interstate Commerce Commission could not proceed under § 13. This contention was rejected, the Interstate Commerce Commission saying:

> "At the hearing herein, counsel for the Georgia Commission filed a motion to vacate the order of investi-

gation and to discontinue this proceeding. The motion, renewed on brief, denies our jurisdiction in instances where, as here, the State Commission has not taken action on the carriers' application. They contend that disposition of this proceeding under such circumstances would amount to an assumption of jurisdiction in the first instance and to the fixing of rates without regard to the rights or jurisdiction of the State and of the regulatory body created to determine the lawfulness of intrastate rates. They contend also that it would be at variance with the practice heretofore observed between this Commission and the various State commissions in such matters and in violation of the established rule of comity.

"Our jurisdiction to remove discrimination against interstate commerce, by prescribing intrastate rates when necessary to do so, may be exercised without awaiting prior consideration or action by a State. In *Florida* v. *United States*, 282 U. S. 194, the Supreme Court observed that:

> 'To hold * * * that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first "sat in judgment on the issues of lawfulness of those intrastate rates" would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority.'

"Accordingly, we find these contentions to be without merit and overrule the motion" (pp. 516-517).

In their Jurisdictional Statement appellants seek to distinguish *Florida* v. *United States*, 282 U. S. 194, cited in the above quotation, on the ground that there the Interstate Commerce Commission's authority over Florida's intrastate rates had been invoked by another State. This is a distinction without a difference. The *Florida* case is in point here and should be held to control.

The order in this case was issued by the Interstate Commerce Commision after the state administrative processes had been resorted to and exhausted. Had *no* appeal to the State courts from the adverse result of those administrative processes been taken by the Illinois Central, the point made by appellants could not have been raised, for the Interstate Commerce Commission is not deprived of jurisdiction to issue an order under § 13(4) by the failure of a railroad to appeal to the State courts from the adverse decision of the State commission. *Rates and Charges of Pullman Co.*, 186 I. C. C. 424, 425 (1932). The fact that an appeal *is* taken by the railroad does not act as a bar to the exercise by the Interstate Commerce Commission of its statutory duty under § 13(4) to protect interstate commerce.

Appellants' contention that the Interstate Commerce Commission's order is invalid because an appeal from the Illinois Commission's order is pending in the courts of Illinois, was properly rejected by the District Court.

II. Substantial Evidence

The second question presented, as stated on page 2 of appellants' Jurisdictional Statement, is: "Did the commutation and multiple fares which were in effect on the suburban system of the Illinois Central Railroad Company prior to the order of the District Court below cause discrimination against interstate commerce within the meaning of § 13(4) of the Interstate Commerce Act?" This is incorrect. In determining the validity of the Commission's order this Court may not undertake itself to decide whether unjust discrimination against interstate commerce resulted from the then-existing intrastate suburban fares of the Illinois Central. The issue before the Court is whether the Commission's order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or

"unsupported by substantial evidence." Administrative Procedure Act, § 10(e), 5 U. S. C. § 1009(2). *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. See pp. 12-13, of the District Court's decision. On the following pages we undertake an explication of the Commission's report and order, showing that the Commission was not arbitrary and that its order is supported by substantial evidence.

The crucial ultimate finding of the Commission is No. 3, on page 552 of its report in 281 I. C. C. 537. That finding is to the effect that the Illinois Central's present suburban fares yield less than cost, cost including a fair return. It reads as follows:

> "3. That petitioner's present multiple and commutation fares do not produce sufficient revenue to cover the cost of providing the service for the curent revenue travel thereunder, including a reasonable return on the rate-making value of the property devoted to such service."

That ultimate finding rests on the conclusion reached on page 546 to the effect that:

> "We conclude that the cost (operating expenses and taxes) incurred by petitioner in 1949, ascribable to its suburban service, as reasonably as may be approximated, exceeded its revenues for that year by about $335,000."

The first question is whether the record contains substantial evidence to support that conclusion and that ultimate finding. The answer clearly is that it does.

As the Commission said on page 542 of its report, the Illinois Central presented in evidence a cost study of its suburban operation based on the year 1949, which was the most recent entire year for which such a study could be made. That study is contained in Exhibit 9, consisting of

34 pages, introduced by witness Martin, comptroller of the Illinois Central and in charge of its accounting department. Witness Martin testified in support of the cost study at pages 375-406 of the transcript of testimony before the Commission.[2]

The results of that study are summarized on page 3 of Exhibit 9, which summary is given by the Commission on page 542 of its report.

Pages 4-9 of Exhibit 9 contain the detail for the revenue figures given in the summary on page 3 of the exhibit, and pages 3 and 4-9 are the source of the Commission's statement at the bottom of page 542 of its report. Pages 10-13 contain the detail of the expense items in the summary, by individual accounts, showing the portions assigned to each account as direct or apportioned. These pages of Exhibit 9 are the source of the Commission's summary near the bottom of page 542 of its report. Pages 14-20 of Exhibit 9 contain statements of the bases used in apportioning all expenses in the study that were not exclusively suburban expenses. These bases were described generally by the Commission on page 543 of its report.

Witness LeRoy, assistant chief statistician for the Illinois Central, also testified in great detail concerning the methods used in determining suburban expenses. See, e. g., Tr. 1006-1094.

The propriety of apportioning to the suburban operation part of the expenses incurred jointly by the suburban operation and other-than-the-suburban operation is virtually axiomatic. *Northern Pac. Ry.* v. *N. Dakota*, 236 U. S. 585, 596-597 (1915). *Illinois Central R. R. Co.* v. *Illinois Commerce Commission*, — Ill. —, decided September 21, 1951.

However, the methods followed by the Illinois Central

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[2] Hereinafter referred to as Tr. —.

in making these apportionments, particularly of the Superintendence and General Expense accounts, were criticized by the present appellants and the subject is covered in their Assignment of Errors.

In its initial brief filed with the Commission on December 11, 1950, consisting of 241 pages, the Illinois Central discussed each account, explaining its method of allocating and apportioning the expenses contained therein to the suburban operation, discussing criticisms voiced of record to its methods, and referring at length to evidence in the record dealing with the subject. We earnestly submit that the record is replete with evidence on the subject of cost, and that there was substantial evidence in the record to support the Commission's conclusion that the expenses incurred in connection with the suburban operations exceeded the revenues derived from it.

The record also shows that the apportionments made by the Illinois Central were verified and their propriety corroborated by the nationally known firm of certified public accountants, Price, Waterhouse & Company. The firm was employed to make a complete and unrestricted study of the Illinois Central's accounts, and was given unlimited access to all books, records and documents. It was also instructed to examine and verify the investment account covering property used in suburban operations and depreciation thereon. See testimony of Witness Connolly, Illinois Central accounting vice president, Tr. 373-375, and Witness Templeton, manager of Price, Waterhouse & Company, Tr. 406-408. Mr. Templeton's testimony and the certificate of his company at page 3 of Exhibit 9 cover the reasonableness of the Illinois Central's apportionments.

The question of apportionments was fully considered by the Commission as shown by pages 543-545 of its report.

On page 544 the Commission discusses and rejects appellants' general criticisms of the apportioned expenses. Appellants had particularly criticized Account 452—a general account covering certain employes in both freight and passenger service—by pointing out that it included certain freight employes whose work could not possibly benefit the suburban service. The Commission pointed out on page 545 that if the isolated items relating to freight were rejected, then a higher percentage would have to be applied to the remaining expenses in the amount which were passenger or common in character, and this would "tend to compensate in whole or in part for the alleged overstatement in the account." The Commission added that with regard to these accounts, "petitioner's procedure, in effect, eliminates freight expenses * * *."

The Commission also said:

> "The method used by petitioner follows the procedure commonly used in cost-finding work for the apportionment of superintendence expenses" (p. 544).
>
> "Protestants' method does not appear to follow through to a persuasive net result" (p. 545).
>
> "Petitioner's procedure produced reasonably accurate results" (p. 545).

On this general question we call the Court's attention to the following from the decision in *State of New York* v. *United States*, 98 F. Supp. 855, decided April 20, 1951, where a three-judge District Court upheld a 13th section order of the Commission requiring increases in the intrastate commutation fares of the New Haven railroad:

> "The above matters are essentially matters of accounting, and are peculiarly within the province of the expert rate-making bodies. That the P.S.C. and the I.C.C. disagreed as to these items is no justification for this Court to constitute itself as expert in accounting methods. To do so would in effect be to transfer the

rate-making power from the state and federal agencies, created by law, to the courts, which the appellate courts have many times stated may not be done. Such items as density of traffic, train loads, allocations of revenue and expense are all problems, involved in the above items. If such items have been considered and evaluated by the I.C.C. and applied in accordance with the principles of law, its conclusion must be final.

"It affirmatively appears in the report that such items were in fact considered by the I.C.C. Some four typewritten pages of the report are devoted to these items." (P. 860.)

This decision was affirmed on appeal to this Court November 26, 1951. (No. 346, *State of New York* v. *United States.*)

Similarly here, based on the foregoing we submit that the Commission's finding on page 546 and its ultimate finding on page 552 that the Illinois Central suburban service was operated at a substantial net deficit in 1949, were supported by substantial evidence.

Another contention made by appellants in their Assignment of Errors relates to maintenance expenses. While making no contention that the amounts shown by the Illinois Central as being spent for maintenance on its suburban property during 1949 were not actually spent, appellants contend that the Commission, in using the 1949 operating results as a basis for prescribing rates for the future, should have reduced those 1949 maintenance expenses to the amount which would represent the theoretical average of such expenditures over the life of the property. The Commission considered this theory on pages 546-547 of its report and rejected it, concluding with the sentence:

"In any event, suburban maintenance expenditures at the 1949 level or higher are now necessary and will be necessary for the forseeable future, in order to provide adequate service for petitioner's current passengers." (P. 547.)

Support for this statement appears in the testimony of witness Trissal, assistant chief engineer of the Illinois Central, both on direct examination (Tr. 318-323) and cross-examination (Tr. 867-893), as well as in his Exhibit 7, pages 18-21. The following, for example, is taken from the witness's cross-examination:

> "Q. * * * Now, my question is, as a result of those things, isn't it a fact that your expenditures for this period in which you are catching up on that are larger than normal?
>
> "A. As I stated in my testimony, so far as I can foresee in the future, the expenditures will not decrease.
>
> "Mr. Wright: Will not decrease?
>
> "The Witness: Will not decrease.
>
> By Mr. Wiles:
>
> "Q. Well, we would get along a lot better if you would answer my questions instead of giving me a different answer. My question is, if your current expenditures, if your effort to make good what you were unable to do during the war period, have not been larger than normal?
>
> "A. No, sir.
>
> "Q. Then you have not endeavored to catch up. You were just maintaining normal expenditures, is that right?
>
> "A. The present expenditures are, in my mind, normal for the forseeable future." (Tr. 889.)

See also, on direct examination, Tr. 320-321. The testimony of the witness quoted by the Commission at page 546 on this subject appears at pages 64-65 of witness Haire's Exhibit 8.

Appellants cite in support of their position *Galveston Electric Company* v. *City of Galveston, et al.*, 258 U. S. 388 (1922), and a number of other cases. None of these is in point. They all relate to maintenance or other expenses which do not fairly represent probable future such expenses.

Many relate to *deferred* maintenance, i.e., expenditures for *making up* maintenance work which should have been done in prior years and which accordingly constitute a single large lump sum which would not fairly represent what future annual expenditures of that kind would probably be. In such a case, as said in the *Galveston case*, "The proper annual charge for maintenance is the amount normally required for that purpose during the period; it is not necessarily the amount actually expended within the year." Other of the cases cited by appellants involve other out-of-the-ordinary expenses which so swell the total annual expenses as to make that total unreliable as a prediction of future annual expenses.

On this record the maintenance expense which appellants think the Commission should have excluded for rate-making purposes does not represent deferred maintenance, even though appellants refer to it as such. See witness Trissal, Tr. 887, 889. This maintenance expense represents maintenance which is greater than in prior years because the property is now reaching the age when these major cyclical repairs are now for the first time having to be taken care of. See Exhibit 8, pp. 64-65. This cycle of greater maintenance is not a short-term cycle.

Appellants err in referring to these allowed maintenance expenses in their Assignment of Errors and Jurisdictional Statement as non-recurring expenses. For the foreseeable future, as witness Trissal testified and as the Commission found, the maintenance expenses on the suburban property will approximate those of 1949. (Tr. 320-321, 889.) The expenses of 1949 are not freak expenses. They approximate what the expenses will be for a considerable period in the future. For the purpose of making rates for the future the 1949 expenses are normal and the Commission committed no error in taking them as such.

Decisions of courts and commissions will be looked for in vain which hold that recognizable annual maintenance expenses should be determined simply by ascertaining the average annual expense over the life of the property. The impracticality of such a procedure must be obvious. For the Commission to have accepted appellants' contention as to the exclusion of maintenance expenses, would have been inconsistent with the National Transportation Policy, 54 Stat. 899, as well as section 15a(2) of the Interstate Commerce Act. No adequate national railway transportation system is possible if carriers' future revenue needs are to be ignored in the fixing of rates.

There was substantial evidence in the record to support the Commission's action in refusing to follow appellants' theory as to maintenance expenses, and the Commission's action was anything but arbitrary.

Another criticism leveled by appellants at the Commission's report, referred to in their Assignment of Errors and Jurisdictional Statement, relates to their contention that the suburban operation should be given a revenue credit for transportation furnished free to employees. The Commission considered this criticism at page 547 of its report, acquiescing in the adjustment therefor suggested by appellants. Appellants in their brief in the District Court stated, "If the I.C.C. had given the necessary effect to this finding it would have found on the basis of the other findings in its report expenses exceeded revenues on the suburban system by only $87,000." Even if, as appellants argue, the record shows a loss of only $87,000, it still proves that the Commission's ultimate finding No. 3 to the effect—

> "That petitioner's present multiple and commutation fares do not produce sufficient revenue to cover the cost of providing the service for the current revenue travel thereunder, including a reasonable return on

> the rate-making value of the property devoted to such service,"

is supported by substantial evidence.

In its ultimate findings Nos. 4 and 5 the Commission finds that the existing comutation fares result in unjust discrimination against interstate commerce in violation of § 13(4) of the Act and will continue to do so unless increased as the Commission prescribes. These findings are as follows:

> "4. That such multiple and commutation fares for intrastate travel between stations on petitioner's suburban lines within the State of Illinois, made or imposed by authority of that State, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable and unjust discrimination against interstate commerce, in violation of the provisions of paragraph (4) of section 13 of the Interstate Commerce Act.
>
> "5. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel the multiple and commutation fares on the bases set forth as prescribed in the appendix hereto."

Holdings of this Court support the proposition that intrastate-rates which fail to return full cost discriminate against interstate commerce. In *United States* v. *Louisiana*, 290 U. S. 70 (1933), this Court said:

> "* * * § 13(4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n* v. *C. B. & Q. R. Co.*, *supra*, 586, 587, 588, 589, 590; *New York* v. *United States*, 257 U.S. 591, 601; *Florida* v. *United States*, *supra*, 211; *Louisiana* v. *United States*, 284 U.S. 125,

131; see *Nashville, C. & St. L. Ry. Co.* v. *Tennessee*, 262 U.S. 318." (Pp. 74-75.)

In *North Carolina* v. *United States*, 325 U. S. 507 (1945), this Court said:

> "* * * For in *Florida* v. *United States*, 292 U. S. 1, 5, we said that § 13(4) authorized the Commission 'to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate.' We sustained the Commission's order there because it was based on findings supported by evidence that the intrastate rate 'was abnormally low and less than reasonably compensatory * * * "insufficient under all the circumstances and conditions to cover the full cost of the service." ' " (Pp. 514-515.)

Similarly here, the Commission's order should be upheld because it was based on findings, supported by substantial evidence, that the intrastate fares were not only abnormally low but actually less than the full cost of service.

The record before the Commission amply proves that because the Illinois Central's suburban fares were at a less than full cost level, intrastate commerce was in truth being unjustly burdened and discriminated against. See in this connection the following testimony of this appellee's witness Martin:

> "Q. Mr. Martin, you have stated that the total and real loss sustained in the Illinois Central's suburban operations during the year 1949 was $543,606 and have presented a certificate of audit by an independent firm to that effect. You have also shown that unless suburban revenues can be increased by increases in fares that similar losses can be anticipated over the foreseeable future. Would any such losses from suburban operations fall upon interstate operations?

"A. Yes, because income from the other operations of the Illinois Central which are mostly interstate must be used to offset the losses incurred in the suburban operations. In other words, if in 1949 we had no suburban operations, the net income of the Illinois Central would have been $543,606 more. Stating it another way, the suburban operations by incurring that loss were a burden on the other operations of the Illinois Central, which as I have stated were mostly interstate, to the extent of over a half million dollars. $50,000,000 worth of our property is devoted to suburban service and instead of contributing and aiding in the production of sufficient revenues to pay for the expenses, taxes and interest charges incurred in earning that revenue plus a reasonable return on the value of the property, the suburban revenues failed by over one half million dollars to pay its way and in addition failed to provide any return whatever on the $50,000,000 worth of property. As I have previously stated, the suburban traffic trends, as well as the actual traffic volume during the first three months of 1950, reflect that in 1950 and in ensuing years, we must anticipate a lesser volume of suburban traffic than we had in 1949; and as our operating and engineering department witnesses have stated, we cannot expect any consequential reduction in expenses; the prospects for a reduction in taxes seems to be quite unlikely; and if any reduction is to be made in our funded debt and interest charges, the capital for that can never be derived from losses. It is clear that the only way to relieve the burden which the suburban losses place on interstate operations is to increase suburban fares so the total revenue from suburban passengers will be sufficient to pay for expenses, taxes, and a fair return on the property used in the suburban operations from which the interest charges payable on that proportion of the mortgages applicable to the suburban property can be paid." (Tr. 387-388.)

The low level of the existing fares also was shown of record. The record showed innumerable comparisons of the

Illinois Central's suburban fares, both the existing fares and those proposed by it, with the suburban fares obtaining interstate and intrastate via steam and electric railroads in Chicago and other metropolitan areas. See Exhibit 2, pages 25-37. The record also showed comparisons between the Illinois Central's suburban service and the suburban service rendered by other railroads in Chicago and other metropolitan areas. See Exhibit 6, page 21, Tr. 259, 267-296. There was ample evidence to support the Commission's statements on page 549 of its report that the existing fares were abnormally low.

It is therefore submitted that Findings 4 and 5 are supported by substantial evidence within the meaning of 5 U. S. C. § 1009(e).

Having concluded in Findings 4 and 5 that the existing suburban fares were discriminating unjustly against and burdening interstate commerce, the Commission's next step was to determine the extent of the increase in fares it had to prescribe to cure the found violations of the Act. This it did, and appellants do not take issue with that phase of the Commission's order. Suffice it to say that in Finding 6 the Commission found:

> "That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary for the future in order that the travel thereunder may make a fair contribution to the revenues needed by petitioner to meet its increased operating expenses due to increases in wages and in prices of materials and supplies and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service." (P. 553.)

It is therefore respectfully submitted that the order of the Commission is patently supported by substantial evidence and is valid.

Conclusion

For the foregoing reasons it is clear that this appeal presents no substantial questions. It is therefore respectfully submitted that the order of the District Court dismissing this complaint should be affirmed.

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December 3, 1951.

Office Supreme Court, U. S.
FILED
DEC 28 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 497

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,
Intervenor-Defendant-Appellee.

BRIEF FOR APPELLANTS IN REPLY TO MOTIONS TO AFFIRM.

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INTERSTATE COMMERCE COMMISSION,
Intervenor-Defendant-Appellee.

BRIEF FOR APPELLANTS IN REPLY TO MOTIONS TO AFFIRM.

Opinion Below.

This brief is submitted in opposition to motions by appellees, Interstate Commerce Commission and Illinois Central Railroad Company, to affirm a decree entered in the above cause by the United States District Court of the Northern District of Illinois, Eastern Division, on October 31, 1951. The decree dismissed the complaint of

the State of Illinois and the Illinois Commerce Commission and denied an injunction sought for the purpose of suspending, enjoining, annulling, and setting aside an order of the Interstate Commerce Commission which prescribed an increase in the intrastate commutation and multiple fares on the suburban system of the Illinois Central Railroad Company.

The opinion and final decree of the District Court have not as yet been reported. A copy of the memorandum, findings of fact, conclusions of law, order, and final decree are attached as Appendix A to the appellant's Statement as to Jurisdiction. A separate copy has also been transmitted from the court below as a part of the certified record on appeal.

Statement of Jurisdiction.

The State of Illinois and the Illinois Commerce Commission, appellants herein, were the original parties plaintiff in the action below. The jurisdiction of the Supreme Court to review by direct appeal the decree of the District Court entered on October 31, 1951 is conferred by Title 28, United States Code, §§1253 and 2101(b). The petition for appeal was filed and allowed on November 16, 1951. The appeal papers were served on November 19, 1951, and service of the motions to affirm was made on December 3, 1951. All papers and fees necessary for the docketing of this appeal were sent to the Clerk of this Court on or before December 21, 1951.

Statement of the Case.

This appeal involves the validity of an order entered by the Interstate Commerce Commission (I.C.C.) under Section 13(4) of the Interstate Commerce Act, as amended (Title 49, U.S.C., §13(4)).[1] The order prescribes increased

[1] Sections 13(3) and 13(4) of the Interstate Commerce Act are attached as Appendix A to this brief.

commutation and multiple fares for the electric suburban system of the Illinois Central Railroad Company (Illinois Central). This suburban system is located entirely within the State of Illinois and is not physically a part of a system over which the same class of traffic moves in both intrastate and interstate commerce. The issues involved in this appeal are therefore unique and have not been considered before by this Court.[2]

Illinois Central operates a line-haul steam and diesel powered passenger and freight transportation system both in intrastate and interstate commerce, and a separate electric suburban passenger transportation system, wholly intrastate, in the southern portion of the City of Chicago and in certain suburbs south of Chicago. This suburban system is situated entirely within the County of Cook in the State of Illinois and provides local transportation service between the center of the City of Chicago and its southern areas and certain suburban towns located south of the city limits. In 1949 more than 31,000,000 of the passengers, or approximately 83 per cent of the total passengers, were entirely local to Chicago. Of a total of 38.29 road miles operated in suburban service 24.25 road miles, or 63 per cent, are located inside the corporate limits of the City of Chicago. Illinois Central's suburban passenger system is operated primarily as an integral part of the local transportation system of the City of Chicago, and in competition with other forms of local transportation within the city. Commutation and multiple fares on this suburban system have been established and maintained exclusively under the authority of the State of Illinois and the Illinois Commerce Commission. That

[2] In *State of New York* v. *United States, et al.*, ... U. S. ... (1951), the I.C.C. had prescribed intrastate commutation fares for a suburban railroad system furnishing both intrastate and interstate commuter service at different mileage rates.

commission is charged with the duty, among others, of fixing the intrastate fares charged by railroads for the transportation of persons within the State of Illinois.

On March 3, 1950, Illinois Central filed with the I.C.C. a petition proposing certain increased commutation and multiple fares on its suburban system, and alleging that the fares then in effect were unduly low and caused a discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act. It was estimated by the railroad that the fares proposed would increase its revenues from the suburban service by about $2,000,000 annually.

On March 30, 1950, Illinois Central filed its Tariff No. 525 with the Illinois Commerce Commission. The fares proposed were the same as those proposed in the petition to the I.C.C. The Illinois Commerce Commission, on April 12, 1950, suspended the proposed tariff and set the matter for hearing.

The Attorney General of the State of Illinois, on April 17, 1950, filed with the I.C.C. a motion to dismiss Illinois Central's petition on the ground that the I.C.C. was without jurisdiction and pointing out that the fare proposal was then the subject of investigation by the Illinois Commission. The I.C.C. deferred action on this motion and set the petition for hearing.

Extensive hearings were held before two examiners, one from each of the commissions, who took the testimony simultaneously though there was no "joint hearing" within the meaning of the Interstate Commerce Act.

On February 28, 1951, the Illinois Commerce Commission entered an order in which it found that the fares proposed in Tariff No. 525 were not "just and reasonable" as they are required to be by the Illinois Public Utilities Act (Ill.

Rev. Stats., 1951, Ch. 111⅔, §§ 32, 36). The tariff was permanently suspended, cancelled and annulled. A petition for rehearing was denied on April 3, 1951. On April 5, 1951, Illinois Central filed its notice of appeal from the order of February 28, 1951, in accordance with the provisions of Section 68 of the Illinois Public Utilities Act (Ill. Rev. Stats. 1951, Ch. 111⅔, §72). The certified record before the Illinois Commerce Commission has been filed with the Circuit Court of Cook County, Illinois, and briefs have been submitted to the court by all parties, but that court has not disposed of the appeal.

On July 30, 1951, a report and order (Complaint, Ex. H) were simultaneously entered by the I.C.C. in which Illinois Central was authorized and required to charge certain specified commutation and multiple fares on its suburban system calculated to increase passenger revenues by some $1,300,000 annually. The I.C.C., in its order, accepted the railroad's contention that in 1949 the expenses of providing the suburban service had exceeded suburban revenues by $335,000. The I.C.C. also found that in 1949 Illinois Central had an operating deficit of $13,000,000 on its entire passenger operations, while Illinois Central's total operations in 1949 resulted in a net railway operating profit of $25,000,000. The principal consideration for the finding that the suburban rates then in effect discriminated against interstate commerce was apparently the I.C.C.'s conclusion that the suburban fares were not producing the "greatest possible earnings" (Complaint, Ex. H., sheets 19 & 20). The rates prescribed by the I.C.C. were apparently designed to produce this result. The Chairman and three Commissioners dissented from the majority report and order because of the pending Illinois proceeding involving the same rates (Complaint, Ex. H, sheets 23-25).

To support its claim of a suburban "operating deficit" of $335,000 in 1949, Illinois Central showed suburban revenues of approximately $7,130,000, and claimed suburban expenses on a fully distributed basis of $7,465,000. Of this latter amount, more than $1,000,000 was charged to the suburban service as its share of expenses which the railroad claimed were incurred jointly by the suburban and through systems, both passenger and freight. Of the amount of expenses so apportioned to the suburban system more than $500,000 represented general supervisory and administrative expenses apportioned to the suburban system from the single set of accounts maintained by Illinois Central to reflect the financial results of its total system-wide operations. This amount was never shown to be reasonably attributable to suburban operations. In fact, in computing this amount, the railroad used methods inconsistent with the general principles, and in violation of the specific provisions, of the I.C.C.'s accounting rules for the separation of joint expenses. This, though not controverted, the I.C.C. ignored.

The I.C.C. found that for rate-making purposes the suburban service was entitled to a credit of $248,000 on account of non-revenue suburban service furnished to employees of the railroad's through system. The Commission, however, gave no effect to this finding.

Both the Chief Engineer of the I.C.C.'s Bureau of Valuation and the Transportation Analyst of the Illinois Commerce Commission testified that more than $500,000 of the direct expenses charged to the suburban system were abnormal, would in substantial part be non-recurring, and represented expenditures for heavy restorative and replacement repairs of a wholly cyclical nature. To this, likewise, the I.C.C. gave no effect.

The order of the I.C.C. prescribing increased fares for Illinois Central's suburban system was issued on August 8, 1951, to become effective on or before October 1, 1951 on 15 days notice by the Illinois Central to the public and the I.C.C. On August 9, 1951, Illinois Central filed notice with the I.C.C. of its intent to put the increased fares into effect on August 25, 1951. The Illinois Commerce Commission was first informed of this intent on August 16, 1951. On the next day, appellants brought an action in the United States District Court for the Northern District of Illinois, Eastern Division, to set aside the I.C.C. order. Appellants also sought a temporary restraining order and preliminary injunction pending the final judgment of the district court. On defendants' assurances that the *status quo* would be maintained until September 15, 1951, the district court did not formally rule on the application for a temporary restraining order. On September 12, 1951, the three-judge district court, after hearing oral argument, announced that the application for a preliminary injunction would be granted. This order, however, was never formally entered as the result of defendants' assurances that the effective date of the order would be extended to November 1, 1951.

After briefs were submitted on the merits and oral argument was heard, the three-judge district court entered an order on October 31, 1951, denying the application for a permanent injunction and dismissing the complaint. It likewise denied a motion of appellants to stay the rate increase pending this appeal. Thereupon, the suburban rates prescribed by the I.C.C. were put into effect on November 1, 1951, and are now in effect.

A petition addressed to this Court to stay the order of the I.C.C., or, in the alternative to require impounding of the rate increase, was denied by Mr. Justice Minton on

November 29, 1951, without prejudice to renewal thereof in the event that this Court should note probable jurisdiction of the appeal or postpone consideration of the jurisdictional aspect to the hearing on the merits.

Questions Presented.

1. Did not the I.C.C. act arbitrarily and unreasonably in finding that a deficit was incurred in Illinois Central's suburban operations in 1949, where, as a basis for the finding, the I.C.C. refused to give effect to its own accounting rules and regulations and to the evidence presented by impartial witnesses?

2. Did not the I.C.C. err in concluding that intrastate commutation fares which do not produce the "greatest possible earnings" unreasonably discriminate against interstate commerce within the meaning of §13(4) of the Interstate Commerce Act?

3. Did not the court below in not considering the questions of statutory construction involved here and in failing to give any indication of having considered the evidence cited to it fairly detracting from the evidence relied on by the I.C.C., improperly exercise its function of judicial review?

4. Did not the I.C.C. act improperly in prescribing intrastate fares while the same fare proposal was being considered by state authorities?

ARGUMENT.

I.

The Interstate Commerce Act authorizes the Interstate Commerce Commission to prescribe intrastate rates only if the intrastate rates fixed by state authority unreasonably discriminate against interstate or foreign commerce.

It stands uncontroverted in the record here that the Illinois Central suburban commuter service is entirely intrastate in character. Indeed, that service is rendered wholly within one county of Illinois, the County of Cook. Actually, the travel of more than 80% of the passengers on the suburban system is confined entirely to the City of Chicago. The validity of the I.C.C.'s order prescribing rates for this suburban service necessarily, then, depends upon the power of that federal agency to prescribe rates for intrastate service.

The Interstate Commerce Act is express in delimiting authority conferred on the I.C.C. with respect to intrastate rates. Sec. 13(4) of that statute (Title 49, U. S. C., §13(4) provides in pertinent part:

> "Whenever in any such investigation [of any rate imposed by authority of any State], the Commission, after full hearing, finds that any such rate * * * causes * * * any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is forbidden or declared to be unlawful, it shall prescribe the rate * * * thereafter to be charged, * * * in such manner as, in its judgment, will remove such advantage, preference, injustice or discrimination. * * *"

The limited character of the authority conferred on the I.C.C. by this provision has been recognized by this Court.

For example, in *North Carolina* v. *United States*, 325 U. S. 507, 511 (1945) it is stated:

> "Neither Sec. 13(4), nor any other Congressional regulation indicates a purpose to attempt wholly to deprive states of their primary authority to regulate intrastate rates."

See also *Florida* v. *United States*, 282 U. S. 194, 212, 214 (1931).

In the instant case, though the I.C.C. made a formal finding of unreasonable discrimination against interstate commerce the record warrants no such conclusion. As this Court pointed out in *North Carolina* v. *United States*, 325 U. S. 507, 510, 511 (1945):

> "The crucial question involved in all these contentions is whether the indispensable prerequisite to the exercise of the federal commission's power over intrastate rates has been shown to exist with sufficient certainty.
>
> * * * * * *
>
> "Intrastate transportation is primarily the concern of the State. The power of the Interstate Commerce Commission with respect to such intrastate rates is dominant only insofar as necessary to alter rates which injuriously affect interstate transportation, *American Exp. Co.* v. *South Dakota*, 244 U. S. 617, 625, 61 L. Ed. 1352, 1358, 37 S. Ct. 656. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty.' *Illinois C. R. Co.* v. *State Pub. Utility Commission*, 245 U. S. 493, 510; before the Commission can nullify a state rate, justification for the 'exercise of federal power must clearly appear'."

In the words of this Court in *Florida* v. *United States*, 282 U. S. 194, 213 (1931), "A general statement in the language of the statute" is not sufficient to justify the exercise by the I.C.C. of its limited authority to fix intrastate rates.

II.

The I.C.C. acted arbitrarily and unreasonably in finding and concluding that Illinois Central's suburban fares then in effect caused an unreasonable discrimination against interstate commerce.

The I.C.C.'s conclusion that Illinois Central's suburban fares then in effect discriminated against interstate commerce was based on its findings that suburban expenses exceeded the suburban revenues by approximately $335,000 in 1949, and that these suburban fares were not producing the "greatest possible earnings." The finding that there was a suburban operating deficit is, however, contrary to the manifest weight of the evidence. Furthermore, the finding that these suburban fares did not provide the "greatest possible earnings" does not support the conclusion that these fares caused the unreasonable discrimination against interstate commerce which §13(4) of the Interstate Commerce Act and the decisions of this Court make an "indispensable prerequisite" to the prescribing of intrastate rates by the I.C.C.

A. The finding by the I.C.C. that Illinois Central incurred a deficit on its suburban system in 1949 is contrary to the manifest weight of the evidence.

In order to justify its conclusion that the record here showed that the rates for the Illinois Central suburban service in effect under the state authority discriminated against interstate commerce, the I.C.C. accepted entirely the railroad's contention that in 1949, the test year used here, the revenues from the suburban service were $335,000

less than the fully distributed costs of rendering such service. In so doing, the I.C.C. refused to give effect both to its own accounting rules and regulations, and to the testimony of the Chief Engineer of its Bureau of Valuation and the Transportation Analyst of the Illinois Commerce Commission.

From Chicago on the north to New Orleans on the south, and from Indianapolis on the east to Council Bluffs, Iowa on the west, Illinois Central operates a steam and diesel power line-haul passenger and freight system. The electric suburban system in Cook County, Illinois is operated as a separate and distinct business using different equipment, different sources of power, different employees, separate tracks. This suburban system provides passenger service of a local character and on a daily basis. Despite the distinct and segregated character of these two independently conducted operations, Illinois Central maintains a single integrated system of accounts for all of its operations (Trans. 1032-44). The alleged operating deficit of $335,000 was, therefore, necessarily developed from calculations, apportionments and distributions of expenses as shown by this single integrated system of accounts reflecting the financial results, not only of the electric suburban system, but of the line-haul passenger and freight business carried on by Illinois Central in nine different states. Thus the weight to be given to the claimed suburban deficit of $335,000 must be measured by reference to a cost study developed by Illinois Central to show, solely for rate-making purposes, the financial results for its uniquely specialized electric suburban operation, on the basis of an accounting system prescribed by the I.C.C. to reflect the financial results of a far flung transportation system over which line-haul freight and passenger operations are conducted.

Illinois Central maintains 19 separate accounts in which administrative and supervisory expenses are recorded (Ex. 9, pp. 19-20; Ex. 17). The nature of the charges in these accounts varies. A few of the charges represent actual system-wide overhead expenses of general benefit to all portions of the system. Salary expenses of the system's general officers such as the President, Vice-Presidents and the Comptroller are typical charges of this type (Ex. 17, sheets 23, 25). Numerous other charges relate to various phases of operations which are exclusively freight or passenger in character. Expenses relating to the office of the Auditors of Freight and Passenger Receipts respectively are typical of such charges (Ex. 17, sheet 25). Still other charges in these accounts relate exclusively to particular operating divisions such as the Memphis Terminal Division or the New Orleans Terminal Division (Ex. 17, sheet 25). (The suburban system itself is wholly within the limits of the Chicago Terminal Division.) From these 19 accounts, Illinois Central apportioned to the suburban system $512,000 of administrative and supervisory expenses for 1949 (Ex. 9, sheets 19-20, 10-13; Ex. 17).

The necessity of apportioning expenses to a particular service from actual joint and common expenses relating to several services does not constitute a problem unique to this case. It is a commonly recurring problem. The general principles to be followed are prescribed by the I.C.C. in its "Rules Governing the Separation of Operating Expenses, Railway Taxes, Equipment Rents, and Joint Facility Rents Between Freight Service and Passenger Service on Large Steam Railways." These rules, as well as the I.C.C.'s Uniform System of Accounts for Steam Railroads were by stipulation included as a part of this record (Trans. 943-4). In this case the separation of joint expenses as between freight and passenger service was fol-

lowed by a further separation as between line-haul and suburban passenger services. Illinois Central, recognizing the identity of the principle involved in both separation procedures, sought to justify its apportionment techniques solely by the claim, that in both separations it had followed the methods prescribed in the I.C.C.'s separation rules (Trans. 955-6; Ex. 9, p. 19).

The cardinal principle embodied in these I.C.C. Rules is that all expenses directly incurred on or relating to particular services or divisions should be directly assigned to those services and divisions. Reflecting this, the first provision of the I.C.C. "Rules Governing Separation of Passenger-Freight Operating Expenses," is as follows:

> "It is expected that carriers will first assign to freight service or to passenger service, including allied service, the expenses that are directly or naturally assignable and that this direct assignment will be carried to the fullest extent that is practicable, except as stated below, without undue increase in accounting expense. The methods indicated under the various accounts are for dividing the common expenses."
>
> "The separation should, as far as practicable, be made by operating or accounting divisions, and the aggregate of the divisional separations reported for the year."

This Court likewise has recognized the validity of this principle. In *Northern Pacific* v. *North Dakota*, 236 U. S. 585, 597 (1915) it said in discussing the manner of determining "fully distributed costs":

> "The outlays that pertain to a given class of traffic must be assigned to that class, and other expenses must be fairly apportioned."

Despite the unambiguous requirements of the I.C.C.'s rules governing the separation of joint expenses, Illinois Central ignored these requirements and failed to make a

single direct assignment to any service save the suburban service (Ex. 17). Account 452, Salaries and Expenses of Clerks and Attendants, for April, 1949, reveals the extent to which expenses in no way related to, and in no way benefitting, the suburban system were charged against that system. First, expenses in the amount of $40,000 were assigned directly to the suburban system (Trans. 984-5; Ex. 9, p. 13). No amounts, however, were similarly assigned to any other service. Instead, an additional portion of the total remaining expenses was charged to the suburban service.

The following table prepared from the entries for this account as shown in Exhibit 17 indicates the extent to which in one account for one month, expenses which were directly assignable to other services and divisions, and which were in no manner related to suburban operations, were nevertheless apportioned to the suburban system.

Item of Expense	*Amount*
Payroll Disbursements, Auditor of Freight Receipts	$104,880.53
Freight Claim Agent	34,298.57
Reverification Bureau (Frt.)	7,782.83
District Accountant, Memphis	34,378.75
Iowa	70.80
Memphis Terminal Car Cleaners	2,027.40
Telephone & Telegraph operations	2,037.46
	$185,476.34
Charged Chicago Suburban, April, 1949, 2.93%	$ 5,434.46

For the month of November 1949, the second month in the test year for which detailed data was furnished, similar charges to the same account aggregated $174,064. The

suburban service was charged with 3.65 per cent of this amount, or $6,353. If the suburban charges for these two months are added together and multiplied by six to represent a year, the final result is a charge from Account 452 alone to the suburban system in 1949 of $70,927, or one-fifth of the net operating deficit alleged.

The methods of apportionment used for Account 452 typify the methods used in apportioning expenses to the suburban service from the 19 supervisory and administrative accounts. Charges apportioned to the suburban system include expenses incurred on and directly assignable to the New Orleans Terminal Division, Centralia Shops, Memphis Shops, Waterloo (Iowa) Shops, and to non-suburban operations on the Chicago Terminal Division. Furthermore, 27.5% of all traveling expenses for supervisory employees was arbitrarily apportioned to the suburban system despite the statement of Illinois Central's Witness LeRoy that "That has nothing to do with suburban, that particular amount" (Trans. 977).

The examination conducted by Price-Waterhouse so heavily relied on by Illinois Central to support its apportionments of expenses to the suburban service, although purporting to relate in part "to the reasonableness of the apportionment of expenses to suburban operations," is in no way relevant to the real issue raised by the methods used by the Illinois Central. As stated by Witness Templeton who supervised the examination, only the accuracy of figures with respect to each transaction was tested (Trans. 1381). The reasonableness of apportioning any part of the charge to the suburban system was a question never coming within the scope of the cursory study made by Price-Waterhouse.

More than $500,000 of allegedly joint supervisory and administrative expenses was apportioned to the suburban service in direct violation of the I.C.C.'s accounting rules. The apportionment of any expenses to the suburban service from expenses directly assignable to other services and divisions creates an improper burden on suburban passengers and should not be considered as part of the expenses attributable to suburban operations. This fact is given clear recognition in the accounting rules of the I.C.C. Neither the record nor its report offers any justification for the I.C.C.'s having ignored its own accounting rules to provide a basis for the exercise of its limited authority to prescribe intrastate fares under the provisions of §13(4) of the Interstate Commerce Act.

The record shows that the fact that Illinois Central maintains a single set of accounts for its separate suburban and through line-haul transportation systems is of equal significance in determining the reasonableness of its claims with respect to maintenance costs on its suburban system.

The accounts maintained are those prescribed under the I.C.C.'s Uniform System of Accounts for Steam Railroads. In considering periodic major repairs, replacements and renewals to ways and structures and equipment, expenses thus developed may be used without any substantial refinement in determining the financial results in any one year for an entire railroad system as wide and varied as Illinois Central's. Unlike Illinois Central's line-haul system, however, the suburban system has not gone through a process of gradual growth and expansion. The entire electric suburban system was put into service in 1926. There have been no material additions to it since that time. Conditions on the suburban system are therefore unique in that the requirement for periodic heavy restorative repairs,

replacements, and renewals, under these circumstances is entirely cyclical in nature. This fact was offered by Illinois Central as a principal justification for the proposed fare increases (Trans. 318-323; Ex. 8, p. 64). Illinois Central's witnesses stressed the fact that the initial cycle of renewals and replacements was now being encountered and that expenditures presently being incurred substantially exceed normal requirements (Trans. 318).

The I.C.C. in its report actually found, on the basis of evidence submitted by the Chief Engineer in its own Bureau of Valuation as well as on the basis of similar evidence submitted by the Transportation Analyst of the Illinois Commerce Commission, that suburban expenses for the year 1949 were above normal by more than $500,000 (Complaint, Ex. H. Sheet 13). The I.C.C., however, gave no effect to these findings.

Ordinarily the I.C.C. does give recognition to the principle that where expenses for heavy repairs, renewals, and replacements are incurred only on a cyclical basis, an averaging technique should be used for the purpose of distributing the non-recurring cyclical repairs equitably throughout the whole of the cycle. Section 25 of "Operating Expenses, Special Instructions" of the Uniform System of Accounts for Steam Railroads is titled "Deferred Maintenance, and Major Repairs to Equipment." Subsection (b) provides that expenses representing "deferred maintenance" may be assigned to certain specified accounts "in anticipation of major repairs to equipment when such repairs are made at intervals of several years." This provision has particular relevance to conditions on Illinois Central's suburban system.

Accounts 317-Passenger car repairs, and 214-Rails, provide the bulk of the total abnormal expenses for 1949 (Complaint, Ex. H, Sheet 13). In considering the abnormal

cyclical expenses reflected in Account 317 the significant fact is that Illinois Central has chosen to keep a single integrated system of accounts for its system-wide and suburban operations. In so doing it elected not to utilize the accounting provisions properly applicable to the unique conditions on its suburban system. If separate accounts were maintained, the imposition of excessive charges against present passengers resulting from unreasonable fluctuations in annual expenses could have been prevented through the proper amortization of heavy restorative repairs over the entire life of the property. In any event, Illinois Central now seeks the benefits of both maintaining a single set of accounts for its through and suburban systems and of recouping from current suburban passengers all heavy restorative repairs necessitated by past operations.

With reference to Account 214-Rails, the I.C.C. found that expenses in 1949 were abnormal in an amount between $115,000 and $121,000. The rails presently being replaced on Illinois Central's suburban system were originally laid in 1925 and 1926 (Trans. 850). The estimated service life for these rails is 20 to 25 years (Trans. 851). All rails over the entire suburban system are replaced within a seven year period at the end of the 20 to 25 year life cycle (Trans. 860-62). Illinois Central contemplates that the present seven year rail replacement program will end in 1953 (Trans. 854). The expenses in Account 214 will contain no abnormal replacement charges beyond this limited period. In failing to give effect to these facts of record the I.C.C. ignored a fundamental rate-making principle by fixing future fares on the basis of present nonrecurring costs. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 398 (1922). Certainly where the I.C.C. prescribes intrastate fares on this basis, justification for the

exercise of its limited authority does not "clearly appear."

The I.C.C. recognized that it was necessary to credit $248,000 to the suburban system for the non-revenue transportation it provided Illinois Central's non-suburban employees. If the I.C.C. had given any effect to this finding, it would have found, even accepting the Illinois Central's other claims as to suburban expenses, that the alleged suburban operating deficit was thus reduced to $87,000. The I.C.C. report contains no such finding. Thus it must be concluded that the I.C.C. ignored this credit in arriving at the conclusion that there was discrimination against interstate commerce.

If proper effect had been given to that adjustment and to the evidence as to joint expenses and maintenance costs, the I.C.C. would have found that suburban revenues exceeded expenses attributable to suburban operations in 1949 by approximately $1,000,000. Thus, to the extent that the I.C.C.'s finding of "unreasonable discrimination" was based on an "operating deficit" of $335,000 that finding is contrary to the manifest weight of the evidence in this record.

B. The I.C.C. erred in concluding that because the Illinois Central suburban rates did not return the "greatest possible earnings" those rates unreasonably discriminated against interstate commerce.

The evidence here shows that in the year 1949 the total passenger operations of the Illinois Central resulted in a deficit of more than $13,000,000. The total operations of the railroad, however, both freight and passenger, resulted in a net profit of more than $25,000,000 in that year. As we have pointed out, the railroad claimed that in 1949 the revenues of the suburban system were exceeded by the

total costs of the suburban service by approximately $335,000. We have pointed out that the uncritical acceptance of this contention by the I.C.C. was contrary to the manifest weight of the evidence. Accepting the railroad's claim, *arguendo,* however, and conceding that higher suburban rates will produce greater net earnings for the railroad from that source, although there is evidence to the contrary, we submit that the I.C.C. erred in concluding that because these suburban rates did not return the "greatest possible earnings", those rates unreasonably discriminated against interstate commerce.

The I.C.C. found, after accepting the railroad's contention that there was a suburban deficit,

> "• • • that in 1949 petitioner [Illinois Central] incurred a deficit from its entire passenger train service of about $13,000,000, or much greater, absolutely and relatively, than the deficit incurred from its suburban operations, and that the latter are intrastate and largely intracity and separate and substantially different from its interstate operations.
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> • • • • • •
>
> "The fact that even with such higher fares petitioner cannot make money or at least so far has been unable to make money on its other passenger train service is no reason for depriving it of an opportunity to make money on its suburban operations." (Comp. Ex. H, sheets 19 and 20.)

The I.C.C. concluded that "the approximate measure of the revenue discrimination against interstate commerce" was $1,300,000 per year and prescribed suburban rates which it estimated would increase the railroad's earnings by that amount.

Actually, therefore, the I.C.C. order is based on the proposition that unless intrastate suburban passenger rates provide the "greatest possible earnings", such intratate

rates unreasonably discriminate against interstate commerce within the meaning of §13(4) of the Interstate Commerce Act and the I.C.C. has the authority to increase such rates. Thus the I.C.C. would make the measure of the "unreasonable discrimination" against interstate commerce which is prohibited by §13(4) the extent to which intrastate passengers will pay higher rates. If the intrastate suburban passengers will pay higher rates, according to the I.C.C., there is unlawful discrimination against interstate commerce if the railroad is not permitted to exploit the demand for its suburban service to the fullest. We submit that this is an astounding distortion of the limitations imposed by the Congress and this Court on the authority of the I.C.C. with respect to intrastate rates.

It is true that this Court has held that intrastate rates lower than interstate rates are discriminatory if the earnings from the intrastate rates are not proportionate to those from the interstate rates. In all of the cases so holding, however, the intrastate and interstate services were comparable. For example, the earnings from interstate switching traffic have been compared to the earnings from intrastate switching traffic. Similarly, earnings from intrastate passenger coach traffic have been compared to earnings from interstate passenger coach traffic and earnings from intrastate commutation traffic have been compared to those required of interstate commutation traffic. *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483, 485 (1934); *Wisconsin Railroad Commission* v. *C. B. & Q. R.R. Co.,* 257 U. S. 563 (1922); *State of New York* v. *United States,* ... U. S. ... (1951). See also: *United States* v. *Louisiana,* 290 U. S. 70, 71, 72, 79 (1933).

In the instant case, however, there is no such comparison of earnings of identical intrastate and interstate service. There can not be. As the record shows, this railroad pro-

vides no interstate service similar to its suburban service. Strangely enough, however, in determining whether there was discrimination against interstate commerce here, the I.C.C. refused to rely on a comparison of the earnings of suburban passenger service to the earnings of the most nearly comparable service provided by this road, its through passenger service. Had it done so, it must have concluded on the basis of its finding that the 1949 deficit of the entire passenger train service was "much greater, absolutely and relatively, than the deficit incurred from its suburban operations" that suburban rates were not discriminatory. The refusal of the I.C.C. to accept this comparison as determinative of the question of discrimination is all the more marked because customarily in commutation cases this is the test which the I.C.C. has applied. Moreover, in applying this test the I.C.C. itself has regularly prescribed commutation rates providing for a lower level of remuneration than that produced by basic passenger coach fares likewise prescribed by the I.C.C. See: *Commutation Fares to and from Washington, D. C.*, 33 I.C.C. 428, 434; *Commutation Fares between New York City and New Jersey Points*, 264 I.C.C. 583, 592; *Increased Passenger Fares, Eastern Railroads*, 269 I.C.C. 87, 89; *Commutation Fares Between New Orleans and The Gulf Coast*, 270 I.C.C. 281, 285-6.

Instead the I.C.C. here compared the earnings of the suburban service to those of the Illinois Central's total operations, including those from its enormously profitable through freight service, without distinguishing the sources of the earnings as between intrastate and interstate business. Such a comparison, we submit, constitutes an improper construction of §13(4) of the Interstate Commerce Act.

Similarly, although the I.C.C. went outside the record to

find that the rates of the Illinois Central suburban service were lower than those of three other railroads providing suburban service in the Chicago area, the I.C.C. failed to ascertain that the earnings of the Illinois Central suburban service in relation to the costs claimed to have been incurred in providing that service were considerably higher than the suburban earnings of any of those railroads. Similarly, investigation by the I.C.C. would have shown that the suburban earnings of the Illinois Central are relatively higher than those of any railroad in the United States furnishing suburban service. These possible earnings comparisons were ignored by the I.C.C.

Instead of availing itself of its customary comparison of earnings for comparable intrastate and interstate services, the I.C.C. devised an *ad hoc* test. That test of "greatest possible earnings" from intrastate rates obviously ignores any limitations on the authority of the I.C.C. with respect to intrastate rates, and if logically expanded would permit the I.C.C. to fix intrastate rates whenever state authority refused to approve rates aimed at securing all the traffic will bear.

The Congress has been express in the limitations imposed on the authority of the I.C.C. with respect to intrastate rates. This Court has declared that I.C.C. action with respect to intrastate rates should be directed only to "substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce • • •" *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 590 (1922). Even assuming *arguendo* that the Illinois Central suburban rates then in effect resulted in an operating deficit, the I.C.C. acted arbitrarily and improperly in concluding that because those rates did not result in the "greatest possible earnings" they resulted in any such discrimination against interstate commerce.

III.

It was improper for the I.C.C. to prescribe intrastate fares while the same fare proposal submitted to the I.C.C. was being considered by state authority.

If the procedural provisions of §§ 13(3) and 13(4) are interpreted to permit railroads to submit initially and exclusively all new intrastate fare proposals to the I.C.C., then the states are either wholly deprived of their primary authority to regulate intrastate rates, or such authority exists solely at the pleasure of the railroads. Nevertheless, this is the interpretation urged by appellees on the basis of *Florida* v. *U. S.*, 282 U. S. 194 (1931). A necessary corollary of such an interpretation is that where a railroad submits an identical proposal for an increase in intrastate fares to the I.C.C. and a state regulatory commission, the I.C.C. may prescribe new intrastate fares prior to the determination by state authority of the reasonableness of the proposals submitted to it. This corollary precisely states appellees' position in this particular case. The corollary, however, like the underlying principle itself, vitiates all primary state authority. Where the states are deprived of the opportunity of making an initial determination under state law of the validity and reasonableness of newly proposed intrastate fares, then the states are in effect prevented from exercising any authority whatsoever with respect to intrastate fares. The opportunity to make such an initial determination is the very essence of any concept of primary authority.

In the present case, Illinois Central originally filed a petition with the I.C.C. alleging that the existing commutation and multiple fares on its suburban system, located entirely within Cook County, Illinois, caused a discrimination

against interstate commerce in violation of § 13(4) of the Interstate Commerce Act. The fares proposed were calculated to increase suburban revenues by $2,000,000 annually. These commutation and multiple fares had hitherto been maintained exclusively under the authority of the State of Illinois. The petition was filed with the I.C.C. on March 3, 1950. On March 30, 1950 Illinois Central filed a tariff with the Illinois Commerce Commission containing identical rate proposals. The filing of this tariff raised the issue of whether the fares proposed were "just and reasonable" within the meaning of the Public Utilities Act of the State of Illinois. (Ill. Rev. Stats., 1951, Chap. 111⅔, §§ 32, 36.) The Illinois Commerce Commission, on February 28, 1951, entered an order permanently suspending the proposed fares finding them to be not "just and reasonable." Illinois Central appealed from this order to the Circuit Court of Cook County asserting that the Illinois Commerce Commission erred in that finding. Thus, Illinois Central seeks to obtain the entire $2,000,000 increase in annual revenues originally requested, and leaves pending for determination under Illinois law the "just and reasonable" fares for its suburban system. The I.C.C. order, however, narrows the state authority to the range between $1,300,000 and $2,000,000, thus practically ousting the state of its primary authority.

Illinois Central correctly asserts on page 9 of its motion to affirm, that there was no requirement under Illinois law that an appeal be taken from the order of the Illinois Commerce Commission. If an appeal had not been taken within the statutory period, however, the fares prescribed in the order would have been conclusively presumed to be "just and reasonable" under state law. The rate-making process contemplated under the Illinois Public Utilities Act would in that case have been completed. (Ill. Rev. Stats., 1951, Chap. 111⅔, § 72.)

The significant fact, however, is that the order of the I.C.C. prescribing increased fares for Illinois Central's suburban system has not deterred Illinois Central from its efforts to obtain from the Illinois courts fare increases substantially in excess of those prescribed by the I.C.C. Illinois Central thus contends that fares prescribed by the I.C.C. are no more than interim fares to remain in effect while it presses for state authorization of even higher fares. The I.C.C. in its motion to affirm supports this contention. Such a contention, however, is in utter derogation of the principles which have in recent years been applied by this Court to the resolution of similar problems in areas of concurrent federal-state jurisdiction. In *Railroad Comm. of Texas* v. *Pullman Co.*, 312 U. S. 496, 500 (1941), this Court, in remanding a case to the District Court pending an appeal on issues of state law in the Texas courts, said:

> "Few public interests have a higher claim • • • than the avoidance of needless friction with state policies, • • •. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

Referring to the duplication of effort resulting from a premature federal determination of issues which might be resolved under state law, this Court said at page 500:

> "The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

See also, *Chicago* v. *Field Crest Dairies, Inc.*, 316 U. S. 168, 173 (1942); *Alabama Public Service Commission* v. *Southern Railway*, 341 U. S. 341 (1951).

In these recent decisions this Court has given effect to practical considerations of efficient judicial administration and to considerations of the vital public interest in the

maintenance of the rightful independence of all branches of state government, including the state judiciary. The necessity of giving effect to the same considerations is no less compelling in the area of federal-state regulation of intrastate railroad fares. From the standpoint of judicial administration, the effect of the I.C.C.'s untimely interference in the determination under Illinois law of Illinois Central's fare proposals has necessarily resulted in the simultaneous appeals now before federal and state courts. Duplication of judicial effort is the inevitable result of the insistence by the majority of the I.C.C. that the orderly determination of local law by state judicial authority is a consideration which is foreign to the exercise of its own authority under § 13(4). Significantly, four members of the I.C.C. dissented from that position.

In the *Pullman* case, *supra*, this Court stated that a doctrine of abstention calling for restraint of federal authority was appropriate to our federal system because of "scrupulous regard for the rightful independence of the state governments." In *North Carolina* v. *U. S.*, *supra*, in reversing the decree of a district court affirming a § 13(4) I.C.C. order, this Court referred at page 511 to its "scrupulous regard for maintaining the power of the state in this field [regulation of intrastate fares]." Thus it is clear that, in the exercise of its limited authority to prescribe intrastate fares under the narrowly defined circumstances set forth in § 13(4), the I.C.C. should not be permitted to vest itself with absolute immunity from the salutary principles announced by this Court in the cases cited above.

As appellees correctly state in their motions to affirm, these contentions were argued below. Although appellees understand the nature of these contentions, it appears that the district court must have misconstrued them. On page 9

of its opinion, the district court expresses its understanding of appellants' contentions to be that the district court was without jurisdiction in the cause. Obviously, appellants, as plaintiffs below, invoked the jurisdiction of the district court. It is impossible to conceive of a way for appellants then to deny its jurisdiction. This misconstruction, however, is a measure of the review of this I.C.C. order provided by the court below.

IV.

The district court refused to give the I.C.C. order proper judicial review.

The memorandum of decision and the findings of fact and conclusions of law disclose the character of the judicial review given this I.C.C. order by the district court. In essence, that review consisted of nothing more than a judicial ascribing of absolute finality to the findings of the I.C.C.

The determination of what constitutes unreasonable discrimination against interstate commerce within the meaning of § 13(4) is essentially a problem of statutory construction. As has been shown, the yardstick of unreasonable discrimination for 30 years has been the relationship between interstate and intrastate earnings for the same class of traffic. In this case, as we have further shown, the I.C.C. has departed from this test and has fashioned a new yardstick which appellants contend to be erroneous, without support in law, and unreasonably discriminatory against intrastate traffic.

The same contentions were argued below both orally and on brief. Despite the substance and novelty of these questions, the district court gave no indication either in its

opinion or in its findings and conclusions that it had considered the problem of statutory construction presented. Thus the district court failed to pass upon a question involving the construction to be given to a statutory prerequisite to the exercise of authority by the I.C.C. with respect to particular subject matter, although this Court has held frequently that such questions have been "left by Congress to the decision of a court." *United States* v. *Idaho*, 298 U. S. 105, 109 (1936); *City of Yonkers* v. *United States*, 320 U. S. 685, 689 (1944); *Interstate Commerce Commission* v. *Northern Pacific Railway Company*, 216 U. S. 538 (1910). Such abdication of this essential judicial function by the federal courts can only result in the expansion of administrative authority beyond the confines prescribed by law.

In this case, moreover, the existence of the statutory prerequisite to the exercise of administrative authority is also a "mixed question of fact and law." As we have shown, the I.C.C. finding of unreasonable discrimination is predicated both on facts asserted and the construction of statutory language. We have argued here as we did below that the finding of a deficit by the I.C.C. was contrary to the manifest weight of the evidence. The district court, however, gave no indication of having considered even the particular evidence in the record which was cited to it as substantially contradicting the I.C.C.'s finding of a deficit. The district court erred in failing to consider this evidence not only because the validity of the administrative order depended on the validity of the administrative finding, but also because the court's failure to consider such evidence contravened the standards of review for administrative orders prescribed by the Administrative Procedure Act. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 485-487 (1951).

Other considerations also dictated a more meaningful review of the I.C.C.'s order than was provided by the district court. This Court has manifested "A scrupulous regard for maintaining the power of the state in this field [regulation of intrastate fares] * * *." *North Carolina* v. *United States, supra.* In the exercise of its "scrupulous regard" this Court has required that "justification for the exercise of the federal power must clearly appear" and that there be adequate administrative findings. *North Carolina* v. *United States, supra.*

These judicially prescribed standards require that the findings of the I.C.C. be something more than arbitrary conclusions unsupported either in law or in fact. The primary authority of the states to regulate intrastate fares can be eliminated just as effectively through a general and uncritical judicial application of a doctrine of "administrative finality" to findings which are made, as it can be through a failure of the I.C.C. to make adequate findings. If, as the district court in its order implies, there is a doctrine of "administrative finality" which vests every I.C.C. finding with substantial support in the evidence as a matter of law, the primary authority of the states to regulate intrastate fares must inevitably give way to the uncontrolled exercise of power by the federal administrative authority.

The issue presented in this appeal is whether the principles enunciated by this Court in the *North Carolina* case are to be vitiated through a failure of a federal court to give adequate consideration to conclusive evidence of arbitrariness in the exercise of the federal administrative authority. Somewhere in the system of judicial review it must be contemplated that such evidence be given the consideration it merits when properly brought to the attention of the courts.

The importance of this case can not be overemphasized. Never before has the I.C.C. exercised its limited authority over intrastate fares in relation to a transportation service so intrinsically and undeniably local in character. The I.C.C. in this case enters the field of local intracity transportation within the clear meaning of that phrase. See *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 230-232 (1947). At this significant point in the administration of § 13(4) of the Interstate Commerce Act we urge this Court to reexamine and clarify the respective functions of federal and state authority and federal judicial and administrative agencies in the fixing of intrastate fares. The facts of this case fully warrant a review of this scope and character.

Conclusion.

For the reasons stated above, it is submitted that the questions presented by this appeal are substantial and of public importance, and that appellees' motions to affirm should be denied.

Respectfully submitted,

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APPENDIX A.

§ 13(3) and 13(4) of the Interstate Commerce Act (Chap. 91, § 416, 41 Stat. 484):

(3) "Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought to issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter."

(4) "Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maxi-

mum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

No. 497

Office - Supreme Court, U.
FILED
DEC 28 1951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951.

STATE OF ILLINOIS and ILLINOIS COMMERCE COMMISSION,
Plaintiffs-Appellants,
vs.
UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

Case Not Docketed on Appeal.

Civil Action No. 51 C 1316 in the District Court of the United States, Northern District of Illinois, Eastern Division.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY THE UNITED STATES OF AMERICA, ILLINOIS CENTRAL RAILROAD AND THE INTERSTATE COMMERCE COMMISSION.

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IN THE

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BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY THE UNITED STATES OF AMERICA, ILLINOIS CENTRAL RAILROAD AND THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF CASE.

This brief is filed in opposition to Motion of Appellees to Affirm without Oral Argument, and their supporting briefs. For purposes of this brief we accept the statement of case as submitted by the Appellees as sufficiently stating the various procedural steps below in accurate form.

We are unable, however, to comply with the rule requiring citations to the pages of the Printed Record, since the time in which we must print this brief to be in season will have expired before the printing of the record is completed. We pray that we may be excused for this omission.

PROPOSITIONS OF LAW RELIED UPON AND AUTHORITIES.

1. **Jurisdiction of the Interstate Commerce Commission under Sec. 13 (4) of the Interstate Commerce Act to override an Intrastate rate set by a State Statute or regulatory body, must be established by a high Standard of Certainty, and the discrimination must be real.**

   North Carolina v. *U. S.*, 325 U. S., 507, 65 Sup. Ct. 1260

   Railroad Commission of Wisconsin v. *C. B. & Q. R. R. Co.*, 257 U. S., 563, 42 Sup. Ct. 232

2. **Where adequate processes of review of an Intra state rate by the State courts is available, the Federal courts and Commissions will not interfere to supercede the orderly state processes, but will observe a rule of comity.**

   Alabama Public Service Commission v. *Southern Ry. Co.*, 341 U. S. 341; 71 Sup. Ct. 762

3. **The jurisdiction of the Interstate Commerce Commission to adjust Intrastate rates is limited to a removal of the discrimination and does not extend to determining reasonableness of Intra state rates per se.**

   North Carolina v. *U. S.*, 325 U. S. 507; 65 Sup. Ct. 1260, 1263

   Florida v. *U. S.*, 51 S. Ct. 119, 126

4. **Regulation of Intrastate Commerce is primarily the function of the States.**

North Carolina v. *U. S.*, 325 U. S., 507; 65 Sup. Ct. 1260, 1263

American Express Co. v. *S. Dak.*, 37 S. Ct. 656, 661

5. **Rate making bodies must consider the normal operating expenses in fixing rates and not non-recurring or infrequently recurring expenditures.**

In re Upstate Telephone Corporation of New York, 13 P.U.R. (N.S.) 134

Re The Potomac Edison Company 7 P.U.R., (N.S.) 135

Federal Power Commission v. *Hope Natural Gas Co.*, 64 Sup. Ct. 281

6. **In judicial review of an order of the Interstate Commerce Commission the court will determine whether the Commission's findings are supported by the evidence considered altogether, not merely whether there was any supporting evidence.**

Universal Camera Corp. v. *National Labor Relations Board*, 340 U. S., 474, 71 Sup. Ct. 456, 464

SUMMARY OF ARGUMENT.

I. The order of the Interstate Commerce Commission was entered without jurisdiction, (pp. 5-19)

(a) The Illinois Central Suburban System is operated wholly within the State of Illinois. (p. 6)

(b) The Illinois Suburban System is operated as separate from the Illinois Central System interstate operation. (pp. 16-18)

(c) There is no undue or unreasonable advantage, preference or prejudice between person or localities shown. (pp. 6, 7, 18)

(d) There is no unjust or unfair discrimination or prejudice to interstate commerce shown. (pp. 11, 15, 16)

(e) The evidence does not support the jurisdictional findings. (pp. 10-14, 18-19)

II. The Interstate Commerce Commission should have withheld action pending outcome of state proceedings under the Comity Rule, even if jurisdiction were conceded. (pp. 19, 20)

III. If jurisdiction were conceded the findings of the Commission on the merits of the case are not supported by the evidence. (pp. 20, 21, 22)

ARGUMENT.

I.

The Order of the Interstate Commerce Commission Was Entered Without Jurisdiction.

The Motion of the Illinois Central Railroad to affirm the above entitled cause under Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, attempts to discuss two issues: First, whether there was jurisdiction, and second, whether there was substantial evidence to support the order of the Interstate Commerce Commission.

On the issue of jurisdiction it considered only the question of whether the Interstate Commerce Commission had jurisdiction to enter its order while the identical question was pending on appeal from the Illinois Commerce Commission in the courts of Illinois.

While that issue is raised by the Assignments of Errors filed herein by the Illinois Commerce Commission and joined in by this Appellant, and while we deem it to be an important issue as is indicated by this Court in *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 71 Sup. Ct. 762, the primary issue of jurisdiction of the Commission to enter the order at all, whether the matter was pending in the State courts or not, is raised by the 4th Assignment of Errors submitted by the Illinois Commerce Commission and joined in by these Appellants.

This issue is of paramount consideration and is not met by the Railroad in its brief. It is argued to some

extent by the Interstate Commerce Commission in its brief.

It is our contention that inasmuch as this entire Illinois Central Suburban operation is conducted wholly in the State of Illinois, jurisdiction must be established, if at all, under Title 49, U.S.C.A., Sec. 13(4), upon one of two grounds.

Section 49, U. S. C. A., Sec. 13(4), so far as pertinent here, reads as follows:

> "(4) Wherever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

1. The Intrastate rate must cause an "undue or unreasonable advantage, preference or prejudice between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand", or

2. "Undue, unreasonable or unjust discrimination against interstate or foreign commerce."

With respect to the first of these grounds the Commission made a reference in its ultimate finding No. 5 to

removing such "person-locality discrimination" as "may exist", but nowhere made any finding that such discrimination did exist.

The District Court did hold that the ultimate findings of the Commission were sustained, but made no specific finding on the person-locality discrimination, and little attention has been given to this question by the Appellees either before the Court below or in their briefs. It was claimed that some interstate passengers did use the Suburban System to complete their journey. Thirteen such rides were shown for half of the year 1949, out of a total of more than thirty-seven million rides for that year on the Suburban System. This could hardly be said to involve an advantage to the suburban riders, or more use would be made of the facilities.

It was also claimed that by riding part of the way to Gary, Indiana, on the Illinois Central Suburban System, and transferring to the South Shore Line for the balance of the journey, a few cents could be saved on the commutation tickets, but there was no evidence that anyone ever did this, and no evidence comparing the accommodations.

We think it is obvious from a reading of the Commission's report and the Findings of the District Court that neither the Commission nor the Court relied upon this ground for the jurisdiction of the Commission, hence we need not discuss it further.

On the question of whether there is found in this case jurisdiction in the Commission by reason of "undue, unreasonable or unjust discrimination against interstate or Foreign Commerce", let us first examine the authorities that mark the boundaries of the Commission's jurisdiction.

In *North Carolina* v. *U. S.*, 65 Sup. Ct. 1260, 325 U. S. 507, this Court said on page 1263:

> "Neither Section 13 (4) nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the States of their primary authority to regulate intra-state rates. Since the enactment of Sec. 13 (4), as before its enactment, a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a State-prescribed rate.
>
> "Intra state transportation is primarily the concern of the State. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Express Co.* v. *South Dakota*, 244 U. S. 617, 625, 37 S. Ct. 556, 660, 61 L. Ed. 1352. A scrupulous regard for maintaining the power of the state in this field has caused this court to require that *Interstate Commerce orders giving precedence to Federal rates must meet 'a high standard of certainty.'* " (Italics ours.)

In the *North Carolina* case the State Commission had ordered a maximum rate for intra-state coach passengers of 1.65 cents per mile. The Interstate Commission increased it to 2.2 cents on a finding that transportation furnished inter-state and intra-state passengers in North Carolina were "substantially similar", that in general these passengers traveled in the same trains in the same cars. This court held that this was tantamount to holding that intra-state fares should not be less than interstate fares, and that Congress had made no such provision. (See pages 1263-1264 Sup. Ct. Edition.)

This would seem to dispose of the Commission's holding urged on this court by appellees in this case that the fact that higher fares were fixed by it on suburban service of the North Western Railway out of the city of Chicago in some way demonstrates a discrimination against interstate commerce by the Illinois Central Suburban fares. (It should be noted that the suburban service of the North Western is interstate running between points in Illinois and Wisconsin, so there was no question of jurisdiction there.

Here the Railroad claimed as a reason for invoking jurisdiction of the Interstate Commission the fact that the Legislature of Illinois had fixed by statute a maximum rate of two cents per mile. (See original petition of railroad.)

If jurisdiction must rest upon a Finding of unjust or unfair discrimination or prejudice, determined by a "high standard of certainty", for the Interstate Commission to supersede a maximum rate fixed by a State Commission, *a fortiori* a "high standard of certainty" would be required for the same Commission to override a maximum rate set by a State Legislature.

It is thus clear that the issue narrows to whether there has been a proper finding supported by evidence meeting the "high standard of certainty" rule that there has been unjust or unfair discrimination or prejudice against interstate commerce. (No foreign commerce is involved.)

This can be determined only by examining the findings of the Commission and the evidence supporting these findings if any there be.

The Commission did find in its "ultimate finding" numbered 4, that the multiple and commutation fares in exist-

ence on the Illinois Central Suburban System were causing "unreasonable and unjust discrimination against interstate commerce."

Passing for a moment the question of whether a finding merely in the language of the statute is sufficient we inquire as to what evidence supports that finding.

The Commission in its brief in support of its motion to affirm page 5 cites the Commission's conclusion (reference p. 546, 281 I. C. C.):

> "* * * that the cost (operating expenses and taxes) incurred by the petitioner in 1949 ascribable to its suburban service, as reasonably as may be approximated, exceeded its revenue for that year by about $335,000.00".

On page 7 of the same brief the Commission cited its report, (reference pp. 550-551) to the effect that the increased fares are

> "* * * necessary to enable the petitioner to earn an adequate return over and above the cost of carrying the travellers thereunder so that it may maintain its well being and be in a position to attract capital."

It nowhere found however what the cost of travellers was or is.

Both the Commission and the Illinois Central argue that the finding of an operating loss of $335,000 for the year 1949 is sustained by the record. Actually, this result is not only not sustained by the evidence, but is not sustained by the Commission's report itself. On page 547 of the report, 281 I. C. C., the Commission found that the suburban system was entitled to a credit of $248,271 for transportation of non-suburban employees, but the Commission failed to give effect to its own finding on this

item when it made its finding on page 546. Had it done so this item alone would have reduced the finding of loss from $335,000 to $86,749.

The Illinois Central argues in its brief that if the deficit was only the smaller sum it was still sufficient to support jurisdiction. Conceding for the sake of the argument merit to this contention, we assert that there was no deficiency which could have been a burden on interstate commerce.

The question of whether there was shown by the evidence to be an operating deficiency which was made up from the interstate operations of the Railroad is determinable not by resolving a conflict of evidence, but by resolving a legal issue that is, "what expenses shall be included in operating expense"?

There is no dispute of the railroad's contention as to what its actual expenditures were for the test year, nor is there any dispute as to what its actual revenues were.

There is the testimony of three witnesses to the effect that many of the items expended were cyclical and nonrecurring, and hence should not be used *in toto* as a base for fixing rates.

One of the witnesses, Hansbury, was the Interstate Commerce Commission's own expert, in fact head of its Department of Valuations. Another witness, Roberts, was an expert analyst for the Illinois Commerce Commission, and the third witness, Hammond, a former chief accountant for the Illinois Commerce Commission, while not making the analysis, corroborated the method and principles applied by Roberts. The computations of Hansbury and Roberts are not factually in dispute. Violent contest is made by the Railroad's witnesses of the theory followed

by these witnesses that the facts involved are those established by the Railroad's own witnesses.

The deficit claimed by the Railroad and sustained by the District Court is arrived at by charging every dollar of money expended by the Railroad on the suburban expenses during the year to operating, whereas, the evidence shows such factors as for example, rail replacement amounting to $144,010.19. (Ex. 9, page 10) to be expended for an item that the Railroad's own witnesses admit has a useful life of 20 years. This item is included in full in operating expense in arriving at an alleged deficit. The Railroad showed a cost of reproduction new valuation for replacement of all rails on the suburban system at $1,080,443. (Exh. 8, page 52). Thus, it becomes obvious that the railroad to arrive at a deficit has included expenditures of approximately 15% of the total cost of replacing all rails in one year's operation, even though the 20 years life of rails agreed upon would indicate a 5% annual replacement cost of $54,022.15 less salvage. The old rails have a high salvage value and when adjusted by crediting the salvage value, Witness Hansbury arrived at an annual new rail cost of $23,000. (See Transcript 1846-1847). Here the Railroad charged into the operating cost for this one test year $121,000 more on this one item alone than the average annual cost of the item.

The Railroad's witness Trissel testified, trans. 856 (the printed page numbers of record are not yet available, so we can make reference only to original transcript pages herein) that 46% of the rails should be replaced at once and projected the sums for 1950-52 for that purpose. A comparable rail replacement program had been carried out in 1948. This would result in 66% of the total

cost of replacement of rails for the entire system in a 5-year period whereas these 5 years should properly bear only 25% of the cost of total replacement.

This item illustrates how the Railroad built up its costs for the test year by replacing equipment and restoring service life which will extend over a long period of years. If it had replaced the full 46% in the one year it could have shown a further deficit of $499,500 and under its theories it could have done so with as much logic as what it did do.

Incidentally, when the Railroad's Witness Haire presented his findings on valuations he considered the rails on the entire suburban system depreciated by only 13½%. (Exhibit 8, page 52).

Thus, we have the conflicting testimony of two of the Railroad's witnesses, one claiming that 46% of all rails must be replaced as rapidly as possible, and the other contending for valuation purposes that there is an existing depreciation of only 13½% on a cost of replacement basis. One of them must be wrong, either the replacement requirements are diminished or the valuation must be diminished so far as this item is concerned.

The excess claim of the Railroad on this item alone of $121,000 more than eliminates the $86,749 of its claimed operating loss remaining after allowing the credit of $248,271 for transportation of non-revenue passengers, which the Commission itself found to be proper.

Witness Hansbury examined several other accounts and found that under the same theory the aggregate amount charged to operating expenses for the test year in excess of what was properly allocable to that year from the

accounts he examined aggregated $655,420. (Trans. 1846-1847.)

Witness Roberts working separately arrived at substantially similar results. (He examined some additional accounts and arrived at a slightly larger figure.)

No one contraverted the facts shown by Hansbury, Roberts corroborated them, and on these items alone there was not a loss, but a substantial profit. The Illinois Commission added to this certain expenses which the Railroad had allocated to the suburban system for which no basis was shown and found a profit of approximately $1,000,000.00.

As to the uncontroverted Hansbury and Roberts items, the court is not asked to determine which witnesses were truthful, but merely to determine whether the theory which the Railroad by its actions contends for is the correct one: That is that the Railroad may accumulate maintenance and replacement items to a given year, make the repairs and replacements that year, thereby extending the service life over a period of many years, but include the entire cost of this replacement program in the one year's expenditure for rate making purposes. If that theory is correct, and if the improper allocation of system expenses to suburban did not exceed $335,000, then the Railroad did have a deficit and might properly apply to the Interstate Commerce Commission for relief, but, if our theory prevails, that this deferred maintenance and replacement program must be spread over the years for which service life is restored to the equipment, in other words amortized for rate making purposes so that the entire burden for twenty years service of rails, for example, will not all be borne by the customers in the rates for one year, then there was no deficit and no burden whatever borne by interstate commerce in this case.

The authorities sustain our contention.

In re Upstate Telephone Corporation of New York, 13 P. U. R. (N. S.) 134, Commissioner Lunn, speaking for the New York Commission said:

> "I believe future rates should be fixed on what may be considered normal maintenance costs. If the Company's claims were allowed, it would be proper, I believe, to deduct the amount of deferred maintenance in arriving at the rate base."

In the case entitled *Re The Potomac Edison Company,* 7 P. U. R., N. S. 135, the Maryland Public Service Commission deducted abnormal expenditures for replacements from current expenditures in arrivlng at a rate base, adhering to the normal year thereof.

This court in *Federal Power Commission* v. *Hope Natural Gas Co.* 64 Sup. Ct. 281, said that the Commission in rate making is not bound to adhere to any single formula, or combination of formulae and adds:

> "Its rate making function, moreover, involves the making of 'pragmatic adjustments'."

We submit that the record here shows that when the expenditures for the test year are adjusted to spread extraordinary expenditures over the life of the restored service achieved by the replacements and renewals, there was clearly a profit on the suburban operations for the test year selected by the Railroad, and this is not determined by resolving conflict of evidence but by giving effect to the only evidence that there is on the subject.

Since there was a profit rather than a loss, there can be no support for the Commission's finding that there was discrimination against Interstate Commerce. In fact the only basis the Commission gives for its finding is the

claimed losses. Give effect to the proper amortization to arrive at normal expenditures, and there is no support whatever to the Commission's finding.

The suburban system of the Illinois system is not a part of the national transportation system. It is purely a local mass transportation operation of the strap-hanger variety. It has separate tracks, separate rolling stock, separate station facilities and separate employees. It is no more a part of the national system than the Chicago street cars or the local bus lines. The fact that it is owned by the Illinois Central Railroad Company, and that company does operate a system in many states, does not render the suburban system interstate any more than stock ownership of the Chicago Bus Company by a Pittsburg investor would render that line interstate. The equipment is not interchangeable to aid, maintain or sustain the national operations of the company. Since there was no loss to be made up by the other operations of the railroad, and no burden on interstate commerce, the only other question to resolve was whether the profits derived from the operation were fair, adequate and reasonable. However, that was a question solely for the State Commission. The Interstate Commission's jurisdiction extends only to the removal of the discrimination when one exists, and not to determining the reasonableness of intrastate rates.

In *Florida* v. *U. S.*, 51 S. Ct., 119, 126, the Court said:

> "The authority to determine the reasonableness *per se* of intrastate rates lay with the State authorities and not with the Interstate Commerce Commission."

This doctrine was reaffirmed in *North Carolina* v. *U. S.* 65 Sup. Ct. 1260, where the court said at page 1263:

> "Neither Section 13 (4) nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the States of their primary authority to regulate intrastate rates. Since the enactment of Section 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its actions would bring about the prejudice or discrimination prohibited by that section."

Similar doctrine had been previously enunciated in *American Express Co.* v. *So. Dak.* 37 Sup. Ct. 656, 661.

In *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.* 257 U. S. 563, 42 Sup. Ct. 232, the Court analyzed the authority of the Interstate Commerce Commission to regulate intrastate rates and made it clear that the basis therefor was the interrelationship of the intrastate commerce with the interstate commerce and the dependence of the national system on the several segments conducting intra-state commerce.

This case reiterates the doctrine consistently adhered to by this court that orders of the Interstate Commerce Commission should not supercede a state rate statute "unless and except so far as it is conforms to a high standard of certainty". On page 238 Sup. Ct. Edition, this Court said:

> "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against and obstruction to interstate commerce."

In the *Wisconsin* case, as in all the cases cited by appellees which we have read the courts were dealing with a system which served both interstate and intrastate traffic on lines which extended across state borders. The court points out that the intrastate traffic is served by the same trains and the same employees. Certainly under

those circumstances the equipment, the track and the employees are all part of a national railway system, whereas in the case of the Illinois Central Suburban, we are dealing with equipment that is not and cannot be used as a part of the Illinois Central interstate system. The trains are electric propelled, whereas the interstate trains are steam operated. The suburban tracks are provided with overhead electrification, the interstate tracks are not so provided. The operating employees are separate. True, the tracks are parallel to each other on some of the right of way, and the same corporation owns both, but there is no evidence in the entire record to indicate that the national transportation system, or even the Illinois Central interstate system would be affected one iota if the suburban system were discontinued entirely.

We find no case holding that mere ownership of a suburban system by the same owners who operate interstate service makes it a part of the national system.

There is not only no "real" discrimination against interstate commerce, there is no discrimination of any kind.

It is not sufficient to argue as appellees have that the findings of the Commission must be sustained if supported by any evidence and that the Court need not resolve the weight of the evidence. We question as to whether that rule applies to a review in any event, but certainly it cannot be applicable on the issue of jurisdiction.

The Interstate Commerce Commission is a subordinate body of the Federal Government, a government of limited powers. It can have no more authority than has been granted it by the Congress, and Congress can have no more than is granted it by the Federal Constitution. The

grant of power to regulate interstate commerce is a curtailment of the state sovereignty. It can operate no further than the limit of its grant, and so far as the commission is concerned it is limited by both the Constitution and the statute. Hence, the jurisdiction cannot be extended by assumption, or by mere examination of one side of the evidence, but as this court has said in the cases cited above, it must be established on all the evidence by "a high standard of certainty." Obviously, to require less than a preponderance of the evidence would not meet a "high standard of certainty."

For all of the above reasons we conclude that the Interstate Commerce Commission was without jurisdiction to enter any order in this proceeding other than to dismiss the petition for want of jurisdiction.

II.

The Interstate Commerce Commission If It Had Jurisdiction, Should Have Withheld Action Pending the Outcome of the State Court Proceedings.

That the same record so far as the facts are concerned was before the Illinois Commerce Commission and was appealed from the Commerce Commission by the Railroad to the Circuit Court of Cook County, Illinois, where it was pending at the time of the proceedings below is not in dispute.

Even if the Interstate Commerce Commission could have found the elements of jurisdiction, comity required that it stay its hand until the State Court had an opportunity to act. This it did not do.

In the case of *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341, 71 Sup. Ct. 762, this

court had before it a case where a three judge District Court enjoined the execution of an order of the Alabama Commission. It was shown that the law in Alabama provided for a complete review by the State Courts with power to stay execution.

This Court held that the Federal Court did have jurisdiction but the Court said:

> "It is in the public interest that Federal Courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

This court reversed the decision of the three judge court because it had failed to observe this rule of comity.

The rule in that case is equally applicable to the case at bar and should have been recognized by both the Commission and the District Court. Indeed, four of the members of the Commission dissented from the order on this very ground and gave no expression as to the merits of the case.

III.

Even If the Commission Had Jurisdiction Its Findings Are Not Supported By the Evidence.

We have pointed out above under the issue of jurisdiction that the evidence disclosed a profit in the Illinois Central Suburban operations and not a loss, and that is based on facts not controverted, but that the issue is one of whether deferred maintenance can be accumulated to a test year, then paid for, and have all expenditures of that year considered as the basis for rate making. Because of the nature of the claim of jurisdiction it was necessary to discuss that element under jurisdiction. We adopt under this heading what we said there without repetition.

We also pointed out that whether the same rule is applicable to the merits or not, jurisdiction must be determined on all the evidence if a factual question is involved, not merely some supporting evidence.

Here we assert that the merits of the case on review must also be determined on all the evidence. It is not sufficient that some evidence may be found which standing alone would support a given finding.

In *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 Sup. Ct. 456, this court said on page 464, Sup. Ct. Ed.:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

That case held that whether it had ever been otherwise or not, under the Administrative Procedure Act the reviewing court must consider all the evidence to determine substantiality.

Further, we call attention to the fact that there is no basis in the evidence whatever for the Commission finding that the return under the old suburban rates were not fair and reasonable or that the return on the new rates would be fair and reasonable.

There is not one word of evidence in the record of what return is necessary to induce investment of capital in enterprises of similar risk either in Illinois or anywhere else. There is no evidence whatever as to what other segments of the entire system of similar value to the suburban system produce, except that it was shown that the system sustained a $12,000,000 loss on passenger business other than suburban.

There is no evidence whatever to show what the fair contribution of the suburban system would be to the entire Railroad revenues. The Commission's findings on this point are purely arbitrary and supported by nothing. Certainly if the suburban system which is a separate operation is required to contribute a share of the cost of the entire operations to maintain a National Transportation System, the Illinois Central interstate, and intrastate (non suburban) passenger operations should be required to contribute its share, and its share should be included in the whole to determine the fair share of the suburban system's contributions, yet this was not done by the commission.

To do otherwise is to merely single out the suburban system and saddle it with an arbitrary contribution to the Railroad Company's revenues, and that is precisely what was done here.

IV.

Conclusion.

We do not purport in this brief to have argued the entire issues involved in the appeal but we believe we have fully demonstrated that there are very serious issues involved in this appeal:

1. That jurisdiction of the Interstate Commerce Commission was overreached in this case.

2. That the comity rule was violated by both the Interstate Commerce Commission and the District Court.

3. That the Commission's findings are not supported by the record.

For these reasons we submit that this case should not be disposed of on a summary motion to affirm but the Appellants should be given full opportunity to brief and argue the issues involved and we urge this in the confidence that upon a full examination of the record this court will reverse the judgment of the District Court.

Respectfully submitted,

WALTER E. WILES,
Attorney for Village of Flossmoor, Cities of Chicago Heights, Blue Island and Harvey, The Villages of Park Forest, Matteson, Homewood, Hazelcrest and Riverdale, and The Illinois Central Commuters Committee,
Appellants-Intervenors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 497

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,

Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,

Intervenor-Defendant-Appellee.

PETITION FOR REHEARING.

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Attorney for Appellants.

WILLIAM R. MING, JR.,
Special Assistant Attorney General.
MILTON MALLIN,
Assistant Attorney General.
JORDAN JAY HILLMAN,
Of Counsel.

Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 497

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,

Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,

Intervenor-Defendant-Appellee.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Now come appellants in the above cause, the State of Illinois and the Illinois Commerce Commission, by Ivan A. Elliott, Attorney General of the State of Illinois, and respectfully petition that a rehearing be granted from the order of this Court, entered on February 4, 1952, granting appellees' motions to affirm the judgment of the District

Court. In support of this petition appellants say as follows:

Under the terms of the Transportation Act of 1920, the Interstate Commerce Commission (I.C.C.) is vested with responsibility for the maintenance of an adequate and efficient national transportation system. Those decisions of the I.C.C. which require the application of technical expertise to the problems involved in carrying out this responsibility may properly be accorded a high degree of finality. Congress never intended, however, and this Court has never held that orders of the I.C.C. purportedly founded on the needs of the transportation system shall in every case be given unquestioned precedence over constitutional considerations which are fundamental to the existence of an efficiently coordinated federal system and over elemental concepts of administrative fairness. This Court in *North Carolina* v. *U. S.*, 325 U. S. 507 (1945), recognized this in holding that nothing in the Transportation Act vests in the I.C.C. plenary authority to fix intrastate fares and that the I.C.C. is without authority to provide for the alleged needs of the national transportation system by fixing intrastate fares on whatever arbitrary and unreviewable basis it deems expedient. Moreover, nothing in the Transportation Act or in the decisions of this Court has cast the I.C.C. in the role of the final arbiter of constitutional considerations profoundly affecting state-federal relations in our federal system. These matters present questions of a judicial character and should not be left to the final determination of an administrative agency. In this case the opinion below demonstrates that the District Court failed to recognize, and therefore could not have decided rationally, the substantial questions of law presented. Under these circumstances appellants respectfully submit that the disposition of this case by this Court through a *per curiam*

opinion without hearing, though it may terminate the present litigation, adds to, rather than reduces, the ambiguity necessarily resulting from the administrative and judicial opinions below. Since state regulation of public utility rates continues, this ambiguity will have a similarly continuing impact on carriers and state and federal officials alike. Summary action by the highest federal court in a case of this nature inevitably weakens the public confidence in the satisfactory resolution of the important problems of state-federal relationships.

Appellants submit that if both the substantive and procedural issues in this case are resolved in favor of the authority of the I.C.C., that "the primary authority of the states to regulate intrastate rates" will be reduced to a principle of passing historical interest. If the Court now considers that the I.C.C.'s conclusions as to the requirements of the national transportation system shall take precedence over every other principle of law and comity, this view should not be left to the indecisive inferences which are inevitably drawn from a *per curiam* opinion. If the principles so clearly enunciated in the *North Carolina* case no longer have meaning, then this should be directed to the attention of the federal and state agencies as well as to the carriers. If the *North Carolina* doctrine has withered through attrition, then this case and others like it will soon demonstrate that what results is not a political void, but rather an area of administrative confusion and uncertainty among both state and federal officials. If, however, the salutary principles in the *North Carolina* case retain the vigor with which they were once endowed, then we urge this Court, upon reconsideration of the facts and issues of this case, to set aside its order and set this cause for argument in order that the judgment of the District Court may be reversed.

Conclusion.

For the reasons stated above it is submitted that the order of this Court entered on February 4, 1952, granting appellees' motions to affirm the judgment of the District Court should be set aside, and the cause set for oral argument.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
Attorney for Appellants.

WILLIAM R. MING, JR.,
Special Assistant Attorney General,
MILTON MALLIN,
Assistant Attorney General,
JORDAN JAY HILLMAN,
Of Counsel.

Certificate.

I certify that this petition for rehearing is presented in good faith and not for the purpose of delaying the final disposition of this cause.

.....

MILTON MALLIN,
Counsel for Appellant.

Office - Supreme Court, U.S.
FEB 26 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951.

No. 479

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,
Intervenor-Defendant-Appellee.

MOTION TO JOIN CERTAIN PARTIES IN PETITION FOR RE-HEARING.

WALTER E. WILES,
Attorney for Village of Flossmoor, Cities of Chicago Heights, Blue Island and Harvey, the Villages of Park Forest, Matteson, Homewood, Hazelcrest and Riverdale, and The Illinois Central Commuters Committee,
Joint Plaintiffs-Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951.

No. 479

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,

Plaintiff-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,

Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,

Intervenor-Defendant-Appellee.

MOTION TO JOIN CERTAIN PARTIES IN PETITION FOR RE-HEARING.

May It Please The Court:

Now come Village of Flossmoor, Cities of Chicago Heights, Blue Island and Harvey, the Village of Park Forest, Matteson, Homewood, Hazelcrest and Riverdale, and The Illinois Central Commuters Committee, joint appellants in the above cause, by Walter E. Wiles, their counsel, and respectfully move the court that they be per-

mitted to join in the Petition for Re-hearing filed in this cause by the State of Illinois, and the Illinois Commerce Commission by Ivan A. Elliott, Attorney General of the State of Illinois, and they do hereby adopt said Petition for Rehearing.

WALTER E. WILES,

Attorney for Village of Flossmoor, Cities of Chicago Heights, Blue Island and Harvey, the Villages of Park Forest, Matteson, Homewood, Hazelcrest and Riverdale, and The Illinois Central Commuters Committee,
Joint Plaintiffs-Appellants.

I do hereby certify that the above motion is presented in good faith and not for the purpose of delaying the final disposition of this cause.

WALTER E. WILES.

Office - Supreme Court, U
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CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 496

STATE OF ILLINOIS and the ILLINOIS COMMERCE COMMISSION,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and ILLINOIS CENTRAL RAILROAD COMPANY,
Defendants-Appellees,

and

INTERSTATE COMMERCE COMMISSION,
Intervenor-Defendant-Appellee.

SUGGESTIONS BY THE CITY OF CHICAGO, AMICUS CURIAE, IN OPPOSITION TO THE MOTIONS TO AFFIRM FILED BY APPELLEES IN THE ABOVE ENTITLED CAUSE.

JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel,
Attorney for Amicus Curiae,
City of Chicago.

CHAMPLIN-SHEALY COMPANY, CHICAGO 303

argument heretofore filed herein by the Illinois Central Railroad Company and the Interstate Commerce Commission, appellees. The interest of the City of Chicago in the denial of said motions will appear more fully from the matters hereinafter set forth.

STATEMENT.

This is an appeal from an order of a three-judge district court, entered on October 31, 1951, A. D., refusing to enjoin the enforcement of an order of the Interstate Commerce Commission which prescribed the rates to be charged on appellee Illinois Central Railroad Company's intrastate suburban passenger system. The action culminating in this decree was begun by a complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division, by the State of Illinois and the Illinois Commerce Commission on August 17, 1951 in which these plaintiffs questioned the jurisdiction of the Interstate Commerce Commission to enter the order complained of, and the sufficiency of the evidence before said Commission to sustain its jurisdiction and support said order. Immediately after the filing of the complaint, City of Chicago, in its own corporate right and as the representative of its inhabitants intervened in the proceeding, adopting the complaint of the plaintiffs and, in addition, alleging that the order of the commission was discriminatory, unsupported by requisite findings of fact, inconsistent, and unsupported by the evidence. The history of the proceedings before the three-judge court up to and including the entry of the order of October 31, 1951 is adequately set forth in the statement as to jurisdiction heretofore filed herein by the appellants State of Illinois and Illinois Commerce Commission. Copies of the opinion of the district court appear as appen-

dix A to said statement as to jurisdiction and as part of the certified record on appeal herein.

On November 16, 1951 A. D., the petition of the State of Illinois and the Illinois Commerce Commission for leave to appeal to this Court from the order of the district court was filed and allowed; the appeal papers herein were served on November 19, 1951. The assignment of errors and statement as to jurisdiction filed therewith indicate that the plaintiffs-appellants raise the following questions: (1) Did the Interstate Commerce Commission have the authority to issue an order prescribing increased intrastate fares for the defendant railroad where such fares had been exclusively maintained under the authority of the State of Illinois and where there was presently pending in the courts of the State of Illinois an appeal from an order by the Illinois Commerce Commission denying the same increases? (2) Did the fares in effect prior to the order of the Interstate Commerce Commission cause discrimination against interstate commerce? (3) Did the court below properly discharge its duty in setting forth, as its findings of fact, statements as to what the report of the Interstate Commerce Commission contained without reference to the evidence in the record detracting from the evidence which might support the order?

On December 3, 1951 the Illinois Central Railroad Company and the Interstate Commerce Commission served and filed with the clerk of the district court motions to affirm the judgment of the three judge district court, containing arguments in opposition to the jurisdiction of this Court on appeal. These arguments were only directed against the contentions of the plaintiffs-appellants State of Illinois and the Illinois Commerce Commission.

Prior to the service of said motions, i.e., on November 30, 1951, the petition of the intervenor City of Chicago for

leave to appeal was filed and allowed by the district court. The order allowing such appeal, a copy of which appears in the certified record, provides:

> "IT IS FURTHER ORDERED that said appeal be allowed separate and apart from the appeal heretofore allowed from said final judgment and decree to the plaintiffs herein, the State of Illinois and the Illinois Commerce Commission."

The city's appeal papers were served by mail on December 3, 1951. The record, appearance fees and appearance of counsel for City of Chicago were transmitted to the clerk of this Court before December 25, 1951. This appeal was docketed in this Court as No. 497.

The assignment of errors and statement as to jurisdiction filed by the City of Chicago raise the following questions: (1) May the Interstate Commerce Commission prescribe rates which, although their total effect on the revenue is reasonable, discriminate unjustly against one group of the carrier's passengers in favor of another group? (2) Was the order of the Interstate Commerce Commission void for failure to make findings to support a basis for the carrier's suburban rates which discriminated against certain of the carrier's passengers? (3) Was the order of the Commission so inconsistent, vague and insufficient on its face to render it void? (4) Was the finding of the Commission that the prescribed fares were just and reasonable supported by substantial evidence to overcome the contention that the fares so prescribed were unreasonably discriminatory?

As of December 28, 1951, ten days after the expiration of the time allowed by Rule 12(3) of this Court, no statement in opposition to the jurisdiction of this Court and no motion to affirm or dismiss was filed in the separate appeal of the City of Chicago.

The City of Chicago, amicus curiae here, is the appellant in a separate appeal from the same order and decree of the

three-judge district court involved in this appeal. No motions similar to those in question herein, have been filed in the City's appeal, and it is therefore impossible for the City of Chicago to draw this Court's attention to the fact indispensable to the consideration of the motions to affirm pending in this Court that two separate appeals have been taken from the same order and decree, without these suggestions by, amicus curiae, of the City of Chicago which is not a party of record in this appeal.

Comparison of the statements as to jurisdiction and the assignments of errors filed in the two appeals will indicate that the issues presented in each appeal are entirely separate and distinct. The appeal of the State of Illinois and the Illinois Commerce Commission questions the jurisdiction of the Interstate Commerce Commssion to enter the order complained of under Section 13(4) of the Interstate Commerce Act. The appeal of the City of Chicago, however, raises questions as to the validity and propriety of the decision and order of the Commission, assuming that it had jurisdiction.

The motions filed in this appeal, request that this Court affirm the order of the three-judge district court without oral argument, and, in support thereof, present only arguments directed against the statement as to jurisdiction filed in this appeal, without mentioning the issues raised by the City of Chicago, appellant in Docket No. 495. Were this Court to grant the relief requested by the motions in this appeal without considering the matters raised in the appeal of the City of Chicago, such action would seriously interfere with this Court's consideration of the merits of the City's case on its appeal, if not foreclose the City from the relief to which it would otherwise be entitled should its contentions be sustained following the submission of briefs and full argument.

SUGGESTIONS.

For the reasons above stated, City of Chicago, as *amicus curiae* herein, and intervenor-appellant in Docket No. 497, respectfully urges that the motions of appellees to affirm without argument be denied, or, in the alternative, that consideration of them be deferred until after consideration by this Court of the separate appeal of the City of Chicago in Docket No. 498.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel,
Attorney for Amicus Curiae
City of Chicago.

FEBRUARY 4, 1952.

Per Curiam Decisions.

No. 497. ILLINOIS ET AL. *v.* UNITED STATES ET AL.; and No. 498. CHICAGO *v.* UNITED STATES ET AL. Appeals from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motions to affirm, in No. 497, are granted and the judgment is affirmed. *Ivan A. Elliott*, Attorney General, *William R. Ming, Jr.*, Special Assistant Attorney General, and *Milton Mallin*, Assistant Attorney General, for the State of Illinois et al.; and *Walter E. Wiles* for the Village of Flossmoor et al., appellants in No. 497. *Joseph F. Grossman* for appellant in No. 498. He also filed a brief for the City of Chi-

cago, as *amicus curiae*, supporting appellants in No. 497. *Daniel W. Knowlton* and *J. Stanley Payne* for the Interstate Commerce Commission; and *Erle J. Zoll, Jr.*, *Charles A. Helsell*, *John W. Freels* and *Herbert J. Deany* for the Illinois Central Railroad Co., appellees in No. 497. Reported below: 101 F. Supp. 36.